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The Quixotic Search for a Judicially Enforceable Federalism

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The Quixotic Search for a Judicially Enforceable Federalism

H. Geoffrey Moulton, Jr.[†]

I.	Introduction	850
II.	The Renewed Search for a Judicially Enforceable Federalism	853
	A. Sovereignty Limits on National Authority: From <i>National League of Cities</i> to <i>Garcia</i>	856
	B. Interpretive Limits on National Lawmaking: <i>Gregory v. Ashcroft</i> and the Policy of Clear Statement	864
	C. Back to Sovereignty: Autonomy Limits on National Authority in <i>New York</i> and <i>Printz</i>	868
	D. Commerce Clause Limits on National Authority: <i>United States v. Lopez</i>	885
	E. The Continuing Allure of a Judicially Enforceable Federalism	891
III.	For and Against a Judicially Enforceable Federalism	895
	A. The Constitution and the Judicial Safeguards of Federalism	896
	B. Pragmatic Justifications: Judicial Review and the Intellectual Case for Federalism	900
	1. Current Doctrine and the Virtues of Federalism	907
	a. The No-Commandeering Rule	907
	b. The Commercial Activity Limit on the Commerce Power	909
	c. <i>Ashcroft's</i> Clear Statement Rule	911
	2. Political Safeguards Theory and the Virtues of Federalism	911

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3. Linking Doctrine to the Virtues of Federalism: The Risks of Intrusive Judicial Review	913
IV. Conclusion: Federalism's Future	922

I. INTRODUCTION

The debate over the appropriate allocation of authority between the state and national governments has spanned the life of the Republic.¹ The Supreme Court, urged on by neo-federalist commentators,² has recently renewed its episodic quest to secure a meaningful role in that debate. After more than fifty years spent largely on the sidelines, the Court has reentered the fray, seeking to enforce a commitment to federalism on several fronts, most notably placing limits on Congress's commerce power in *United States v. Lopez*³ and carving out protection for state autonomy in *New York v. United States*⁴ and *Printz v. United States*.⁵ The Court's search for a judicially enforceable federalism springs in part from two convictions: first, that there is value in state-level norm-setting; and second, that Congress has demonstrated that it cannot be trusted to leave suitable decisions to the states. While both convictions may harbor considerable truth, the lines drawn in *Lopez*, *New York* and *Printz* are unsupported by constitutional text, struc-

1. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Justice Marshall stated that "the question respecting the extent of the powers actually granted [to the national government by the Constitution], is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Id.* at 405. Writing to a European audience in 1888, Lord James Bryce observed: "All Americans have long been agreed that the only possible form of government for their country is a Federal one. . . . But regarding the nature of the Federal tie that ought to exist there have been keen and frequent controversies . . ." 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 453 (1888). More recently, Justice O'Connor described "discerning the proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law." *New York v. United States*, 505 U.S. 144, 149 (1992).

2. See, e.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

3. 514 U.S. 549 (1995). *Lopez*, decided in 1995, marked the first time the Court had struck down a federal law as beyond the commerce power since 1936. See Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 15 (1995) (identifying *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), as the last such ruling prior to *Lopez*).

4. 505 U.S. 144 (1992).

5. 521 U.S. 898 (1997).

ture or history. Moreover, they neither meaningfully promote state-level norm-setting nor protect against congressional usurpation of decisions that states are more competent to make. In short, the Court's current search for doctrine that would meaningfully promote federalism values, while understandable and perhaps well-motivated, has been a failure.

The contemporary debate over federalism, particularly among legal academics, has centered on whether and to what extent the Supreme Court must act to protect the states. One school of thought contends that states need no judicial protection from national legislation, because states have a sufficient role in the national political process to protect themselves. This theory, first offered by Herbert Wechsler⁶ and later elaborated by Jesse Choper,⁷ found its judicial voice in *Garcia v. San Antonio Metropolitan Transit Authority*.⁸ The contrary view, that adequate protection for state interests requires vigorous judicial review in federalism cases,⁹ had a brief run after *National League of Cities v. Usery*¹⁰ and now again is ascendant. The advocates of vigorous judicial review rightly observe that without such review, the Supremacy Clause grants federal policymakers complete control over the balance of power between the state and national governments.¹¹ The opponents of vigorous judicial review rightly observe that despite largely unfettered control for more than sixty years, the national government has not overrun the states. What both camps (and the Supreme Court) tend to ignore, however, is that federalism

6. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

7. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1560-77 (1977).

8. 469 U.S. 528 (1985).

9. For criticisms of Wechsler and particularly Choper, see, for example, MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 23-62 (1995); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

10. 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

11. See *New York v. United States*, 505 U.S. 144, 159 (1992) ("[T]he Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power.") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

is not simply about protecting the states from national encroachment. It is also about empowering the national government to act where appropriate. After all, American federalism was invented as a means of creating a more effective (and necessarily more powerful) national government than existed under the Articles of Confederation.

The great insight of federalism is that different levels of government have different competencies, and that wisely allocating responsibilities to those different levels of government can work significant benefits in terms of both citizen satisfaction and governmental efficiency. Federalism's great question, then, is not how to protect the states but how to create the conditions necessary to promote wise allocation decisions. At bottom, federalism is about institutional choice, about deciding what level of government gets to decide what issues.¹² But the debate over judicial enforcement of federalism is also about institutional choice—about who gets to make federalism's allocation decisions. This Article critically examines the Supreme Court's recent efforts to be a player in the contemporary federalism debate, and takes the position that few if any normative disputes about the desirable allocation of governmental power ought to be resolved by the courts. Indeed, the contemporary search for a judicially enforceable federalism has been not only irrelevant but also potentially counterproductive to the important and complex task of rationally allocating authority among national, state and local governments.

Part II of the Article examines the Supreme Court's search for a judicially enforceable federalism, looking briefly at decisions in the early part of this century and then concentrating on Commerce Clause and Tenth Amendment cases decided from *National League of Cities v. Usery*¹³ in 1976 through *Printz v. United States*¹⁴ in 1997. This examination reveals a Court that has been casting about for meaningful limits on national authority without linking those limits either to constitutional text, structure, or history, or to the pragmatic advancement of federalism values. Along the way, the Court has

12. For a conceptually sophisticated discussion of the importance of (and techniques for) comparing institutions' relative capacities for different types of decisionmaking, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

13. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

14. 521 U.S. 898 (1997).

bounced back and forth between active and passive roles, aggressively protecting "States as States" in *National League of Cities*, then declaring in *Garcia* its intent to leave federalism to the political process, then undermining the conceptual underpinnings of that declaration to the point that *Garcia* has been effectively overruled. Part II concludes by considering why the Court, despite repeated failures, continues to be drawn to the alluring flame of a judicially enforced federalism. Part III then turns to explore whether and to what extent, despite the Court's failures both of doctrine and justification, there remains a meaningful judicial role with respect to the definition and enforcement of federalism.

II. THE RENEWED SEARCH FOR A JUDICIALLY ENFORCEABLE FEDERALISM

In the early part of this century, the Supreme Court assumed a substantial role in determining the appropriate relative roles of the state and national governments in the American federal system.¹⁵ The Court's interest in protecting private property rights, coupled with a strong sense of impregnable state power, led to a series of decisions designed to assure that private property rights be as free as possible from national government regulation. In *Hammer v. Dagenhart*,¹⁶ for example, the Court struck down a federal statute that prohibited the interstate transportation of goods manufactured by child labor. Justice Day's majority opinion emphasized the separate spheres of national and state responsibility:

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not give it authority to control the States in their exercise of the police power over local trade and manufacture.

15. The Supreme Court's role in resolving confrontations between national and state power dates back to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Until the last decade of the nineteenth century, the Court's Commerce Clause decisions did not address the authority of Congress to legislate because for the most part "Congress seldom perceived the necessity to exercise its power in circumstances where its authority would be called into question." *United States v. Lopez*, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring). The Court instead "faced the related but quite distinct question of the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act." *Id.*

16. 247 U.S. 251 (1918), overruled by *United States v. Darby*, 312 U.S. 100 (1941).

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.¹⁷

Perhaps the high water mark for judicial protection of private property rights from national regulation, *Hammer v. Dagenhart* echoed the state sovereignty approach to limiting federal power found in earlier cases like *United States v. E.C. Knight Co.*,¹⁸ which treated the Tenth Amendment as prohibiting federal encroachment on certain state authority such as the police power. Later cases, like *Railroad Retirement Board v. Alton Railroad Co.*,¹⁹ *A.L.A. Schechter Poultry Corp. v. United States*,²⁰ and *Carter v. Carter Coal Co.*,²¹ reaffirmed the Court's strong interest in both defining and policing the line that the national government could not cross. In so doing, these cases embraced "dual federalism," the "idea that certain subject-

17. *Id.* at 273-74.

18. 156 U.S. 1 (1895) (holding that application of the Sherman Act to monopoly in manufacture of sugar would violate the Constitution by encroaching on state police power).

19. 295 U.S. 330 (1935) (striking down compulsory pension scheme for railroad workers as beyond Congress's power under the Commerce Clause). In *Railroad Retirement Board*, the government argued that railroad efficiency is a legitimate matter for Commerce Clause regulation, and that a guaranteed pension promotes morale and thus efficiency. In language that would be echoed sixty years later by Chief Justice Rehnquist in *Lopez*, Justice Roberts responded to this argument as follows:

Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power.

295 U.S. at 368.

20. 295 U.S. 495 (1935) (holding that the wages and hours of employees of a New York slaughterhouse and in-state sale of poultry were purely local matters not subject to regulation by the national government).

21. 298 U.S. 238 (1936). *Carter Coal* concerned the constitutionality of the Bituminous Coal Conservation Act of 1935, which taxed the sale of coal but granted a tax reduction to coal companies that agreed to wage and hour regulation for their workers. The Court held that the Act was not a tax but a penalty, and therefore outside Congress's taxing power. *See id.* at 288-89. In addition, the Court concluded that the Act was not supported by the Commerce Clause because mining, like manufacturing, was not interstate commerce. *See id.* at 302.

matters were . . . segregated to the States and hence could not be reached by any valid exercise of national power."²²

Beginning in 1937, however, the Court decided a series of cases in which it effectively abandoned any serious effort to protect the states from the nation.²³ In *NLRB v. Jones & Laughlin Steel Corp.*,²⁴ the Court dramatically broadened its reading of Congress's Commerce Clause power and upheld national regulation of unfair labor practices. According to the Court's new majority:

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.²⁵

In *United States v. Darby*,²⁶ the Court overruled *Hammer v. Dagenhart*²⁷ and expressly rejected the idea that the Tenth Amendment imposed any affirmative limits on congressional authority.²⁸ *Wickard v. Filburn*,²⁹ decided a year after *Darby*, abandoned the doctrine that agricultural production was not commerce and reaffirmed the aggregation principle established in *Jones & Laughlin Steel* and *Darby*.³⁰ The question for the Court had become not whether Congress had impinged on state sovereignty, but only whether congressional action was within the scope of federal power. Given the growth and integration of

22. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 16 (1950).

23. For a contemporary critical assessment of this abandonment of judicial review of federalism issues, see *id.* at 17.

24. 301 U.S. 1 (1937).

25. *Id.* at 37 (citation omitted).

26. 312 U.S. 100 (1941).

27. 247 U.S. 251 (1918).

28. The Court described the Tenth Amendment as

but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

312 U.S. at 124.

29. 317 U.S. 111 (1942).

30. See *id.* at 127-28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

the national economy, very little activity of consequence fell outside the commerce power. These cases, without quite saying so, ceded to Congress the responsibility for deciding the scope of its own powers.³¹

More recently, the Supreme Court again has sought an active role. This Part examines that quest, from the Court's short-lived bicentennial year decision in *National League of Cities v. Usery*³² through *Printz v. United States*,³³ decided on the last day of the Court's 1996 Term. These cases reveal a Court disconcerted by this century's dramatic expansion of federal power and by its own seeming inability to do much about it. The Court is again casting about for some check on national power and again has failed to draw a meaningful line that has support in constitutional text or history, or that significantly promotes federalism values.

A. SOVEREIGNTY LIMITS ON NATIONAL AUTHORITY: FROM *NATIONAL LEAGUE OF CITIES* TO *GARCIA*

In *National League of Cities*, the Court considered the constitutionality of the wage and hour provisions of the Fair Labor Standards Act (FLSA) as applied to employees of state and local governments. Long before, in *United States v. Darby*,³⁴ the Court had found congressional authority under the Commerce Clause to regulate the wages and overtime pay of private employees. More recently, in *Maryland v. Wirtz*,³⁵ the Court had upheld the extension of the FLSA to certain public employees, rejecting as "not tenable" the claim that the Act "may not be constitutionally applied to state-operated institutions because [the Commerce Clause] must yield to state sovereignty in the

31. The post-1937 doctrinal revolution reflected much more than a change in judicial attitudes about federalism. Not only did it occur in the wake of a political revolution that culminated in Roosevelt's court-packing plan, but it also reflected a deep philosophical shift: the rejection of *laissez faire*. The resulting increased deference to economic regulation applied not just to national regulation but to state and local regulation as well. See *United States v. Lopez*, 514 U.S. 549, 605-07 (1995) (Souter, J., dissenting) (discussing parallels between Commerce Clause and Due Process Clause jurisprudence relating to economic regulation).

32. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

33. 521 U.S. 898 (1997).

34. 312 U.S. 100 (1941).

35. 392 U.S. 183 (1968), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

performance of government functions.”³⁶ *National League of Cities* overruled the eight-year-old decision in *Wirtz* and held that Congress could not regulate the wages and hours of employees engaged in “traditional governmental functions,” not because the relevant state activity did not affect commerce, but because “there are attributes of sovereignty attaching to every state government which may not be impaired by Congress.”³⁷ The Court’s reference to a protected core of state authority sounded a note that echoed the “dual federalism” of earlier cases like *E.C. Knight* and *Hammer v. Dagenhart*.

The five-member majority, speaking through Justice Rehnquist, acknowledged Congress’s broad authority under the Commerce Clause and conceded that such authority extended to regulating the wages and hours of private employees.³⁸ In this sense, at least, the case did not represent a return to the Court’s pre-New Deal conception of national authority, under which Congress could not penetrate the protected enclave of police powers reserved to the States. The *National League of Cities* Court instead argued that “States as States stand on quite a different footing” from private employers,³⁹ and held that Congress does not have the power under the Commerce Clause “to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.”⁴⁰ The power to determine the wages and hours of public employees engaged in those functions was “[o]ne undoubted attribute of state sovereignty.”⁴¹ By not only increasing the financial burden on states but also “displac[ing] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require,”⁴² the

36. *Id.* at 195.

37. 426 U.S. at 845. Justice Rehnquist’s majority opinion in *National League of Cities* was foreshadowed by his earlier dissent in *Fry v. United States*, 421 U.S. 542 (1975). In *Fry*, the petitioners argued unsuccessfully that the Economic Stabilization Act of 1970, which authorized the President to regulate salaries and wages, was unconstitutional as applied to the states because it interfered with sovereign state functions. *See id.* at 547. While the Court rejected petitioners’ claim, Justice Rehnquist contended that there must be a line between state and national power, and that the line might be drawn where federal legislation interferes with “traditional state functions.” *Id.* at 558 (Rehnquist, J. dissenting).

38. *See National League of Cities*, 426 U.S. at 840-41, 849.

39. *Id.* at 854.

40. *Id.* at 852.

41. *Id.* at 845.

42. *Id.* at 847.

Court argued, the FLSA impermissibly interfered with state sovereignty.⁴³

National League of Cities was both hailed and condemned as marking a revolutionary shift in the Court's role in defining and enforcing federalism.⁴⁴ Justice Brennan's dissent, for example, described the Court's decision as a "catastrophic judicial body blow at Congress' power under the Commerce Clause."⁴⁵ While more than a little hyperbolic, Justice Brennan's opinion captured the widespread sense that *National League of Cities* promised to work a dramatic change in the relationship between the national and state governments. That promise went unfulfilled, however, in part because the Court failed to offer any meaningful account of the states' role in the federal system.

Justice Rehnquist's majority opinion mentioned "earlier decisions of this Court recognizing the essential role of the States in our federal system of government,"⁴⁶ quoted the *Texas v. White*⁴⁷ reference to "an indestructible Union, composed of indestructible States,"⁴⁸ and asserted that "dual sovereignty" assured the states "independent authority" within "their proper spheres."⁴⁹ But beyond these platitudes, the opinion not only failed to describe the states' role but also offered no account of how or why state interests need protection from the national government.⁵⁰ The opinion contained no theory from

43. Justice Blackmun joined the majority opinion in *National League of Cities*, providing the crucial fifth vote. In a brief concurrence, however, he described himself as "not untroubled" by the case, 426 U.S. at 856 (Blackmun, J., concurring), thus portending his later decision to switch sides on the question of judicial enforcement of federalism.

44. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 11 (1988) (describing *National League of Cities* as "a revolutionary opinion"); Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1192-93 (1977) (describing the opinion as "outrageous," and as having "revolutionary potential"). But cf. Van Alstyne, *supra* note 9, at 1713 (describing *National League of Cities* as "only the most modest sort of federalism restraint on Congress").

45. 426 U.S. at 880 (Brennan, J., dissenting); see also *id.* at 858 (describing the decision as "patent usurpation of the role reserved for the political process").

46. *Id.* at 844.

47. 74 U.S. (7 Wall.) 700 (1869).

48. 426 U.S. at 844 (quoting *Texas v. White*, 74 U.S. at 725).

49. *Id.* at 844.

50. See D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW.

which lower courts (or ultimately the Supreme Court itself) could give content to the asserted protection for "traditional" or "integral" or "core" state governmental functions.⁵¹ As a result, while hundreds of litigants raised federalism claims based on *National League of Cities*, almost none were successful.⁵² In the Supreme Court, the case became little more than a sport. The Court repeatedly rejected federalism claims remarkably similar to that which it had accepted in *National League of Cities*, without any effort to elaborate either the states' role in the federal system or the judiciary's role in policing the boundary between state and national authority.⁵³

Finally, in *Garcia*, the Court put *National League of Cities* out of its misery. *Garcia* initially presented the narrow question whether municipal operation of a mass transit system was a traditional government function under *National League of Cities* and therefore exempt from the Fair Labor Standards Act.⁵⁴ After argument, however, the Court set the case for re-

U. L. REV. 577, 589 (1985).

51. One interesting feature of *National League of Cities* is its almost passing reference to the Tenth Amendment. While the case is ordinarily treated as centering on the Tenth Amendment, see, e.g., Merritt, *supra* note 44, at 11, the majority opinion's only reference to the amendment is in the following passage:

[O]ur federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power. In *Fry [v. United States]*, 421 U.S. 542, 547 (1975), the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

426 U.S. at 842-43 (citations omitted).

52. See Merritt, *supra* note 44, at 11-12. For an extended discussion of lower court treatment of *National League of Cities*, see La Pierre, *supra* note 50, at 590-600.

53. See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding national regulation of strip mining); *FERC v. Mississippi*, 456 U.S. 742 (1982) (upholding national energy policies that forced state agencies to consider nationally specified approaches to rate-making); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (upholding application of federal age discrimination laws to state employees); see also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978) (stating that *National League of Cities* does not limit Congress's power to enforce the Civil War Amendments).

54. Lower courts had split on the question. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 & n.1 (1985).

argument on the question whether *National League of Cities* should be reconsidered.⁵⁵ Justice Blackmun, who nine years earlier had provided the crucial fifth vote in *National League of Cities*, ultimately switched sides and voted to overrule it.⁵⁶

Writing for the *Garcia* majority, Justice Blackmun attacked "as unsound in principle and unworkable in practice" the Court's earlier effort to tie state protection from federal regulation to judicial identification of "traditional" or "integral" governmental functions.⁵⁷ This attack targeted two claimed flaws in the *National League of Cities* analysis. First, neither *National League of Cities* nor later cases offered any principled basis for identifying traditional governmental functions. After examining the Court's failed effort to distinguish between governmental and proprietary functions in the area of intergovernmental tax immunity, the *Garcia* majority declared the absence of "standards that might be employed to distinguish between protected and unprotected governmental functions."⁵⁸

Second, *National League of Cities* erred in concluding that states need *judicial* protection from national encroachment. According to Justice Blackmun:

Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.⁵⁹

55. See *id.* at 536.

56. For an account of Justice Blackmun's change of heart, of the decision to set *Garcia* over for reargument, and of the decision to overrule *National League of Cities*, see Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623 (1994).

57. 469 U.S. at 546-47.

58. *Id.* at 543.

59. *Id.* at 550-51. In particular, Justice Blackmun noted that the Constitution gave states control over voter qualifications and the electoral college and hence influence over the House of Representatives and the Presidency. See *id.* at 551. As for the Senate, the Constitution assures states direct influence by mandating equal representation. See *id.* In explaining that the national political process adequately protects states from the national government, Justice Blackmun relied heavily on the arguments made by Professor Herbert Wechsler in his 1954 article, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, see *supra* note 6. He also cited for support on this point Jesse Choper's *Judicial Review and the National Political Process*, see *supra* note 7, and D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States As Agents of the Nation*, 60 WASH. U.

These structural components of the Constitution, Justice Blackmun concluded, not only adequately protect states from the national government but also reflect all the protection contemplated by the Framers, who "chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority."⁶⁰ In short, judicially defined limits on the authority of the national government to affect state interests were unnecessary because "[t]he political process ensures that laws that unduly burden the States will not be promulgated."⁶¹

Beyond despair over discovering manageable standards and confidence in the political process, the *Garcia* Court also invoked federalism principles in support of abandoning judicial enforcement of federalism principles. By limiting state immunity from national regulation to traditional governmental functions, the Court contended, the *National League of Cities* approach imposed added costs on those states that choose nontraditional or unorthodox approaches to solving the problems of government.⁶² "The essence of our federal system" includes the freedom of states to "serve as laboratories for social and economic experiment."⁶³ Judicial protection of only traditional government functions burdens experiment and is therefore "[un]faithful to the role of federalism in a democratic society."⁶⁴ The ironic consequence of this reasoning, of course, is less protection for states, as Congress is left free to burden any sort of state activity, traditional or experimental.⁶⁵

Apart from its odd use of Justice Brandeis's laboratory metaphor, the *Garcia* majority made no real effort to describe a role for the states in the American federal system. The Court perfunctorily acknowledged that "the States occupy a special

L.Q. 779 (1982). See *Garcia*, 469 U.S. at 551 n.11.

60. 469 U.S. at 551-52 (citing James Madison and James Wilson).

61. *Id.* at 556.

62. See *id.* at 546.

63. *Id.* (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

64. *Id.*

65. Cf. *id.* at 567-68 n.13 (Powell, J., dissenting) ("The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as 'laboratories.'").

position in our constitutional system,"⁶⁶ but rejected the project of "identify[ing] certain underlying elements of political sovereignty that are deemed essential to the States' 'separate and independent existence.'"⁶⁷ Indeed, the Court's opinion suggests that states will have whatever role Congress chooses to leave them:

The power of the Federal Government is a "power to be respected" as well [as state power], and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. In short, we have no license to employ freestanding conceptions of state sovereignty where measuring congressional authority under the Commerce Clause.⁶⁸

Any remaining judicial role would have to be "tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"⁶⁹ Unfortunately, the Court offered no method for identifying failures in the national political process that might warrant judicial intervention.⁷⁰ Instead, without analysis, it simply asserted that "[i]n the factual setting of these cases the internal safeguards of the political process have performed as intended."⁷¹

Garcia returned us to the post-New Deal world of federalism that had prevailed from 1937 until *National League of Cities* in 1976. As it had in *NLRB v. Jones & Laughlin Steel Corp.*,⁷² *United States v. Darby*,⁷³ and *Wickard v. Filburn*,⁷⁴ the Court in *Garcia* withdrew from the business of enforcing substantive limits on national power. And as it had in *National*

66. *Id.* at 547.

67. *Id.* at 548 (quoting *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

68. *Id.* at 550.

69. *Id.* at 554 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)).

70. In the later case of *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court described *Garcia* as having "left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." *Id.* at 512 (emphasis added). As to what those extraordinary defects might be, the Court simply noted that "South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 512-13 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

71. 469 U.S. at 556.

72. 301 U.S. 1 (1937).

73. 312 U.S. 100 (1941).

74. 317 U.S. 111 (1942).

League of Cities, the Court in *Garcia* offered no meaningful discussion of the nature of our federal system and thus no principled basis for its second 180-degree change of direction in just seventeen years. The Court reaffirmed *Garcia* three years later in *South Carolina v. Baker*.⁷⁵ Again without addressing the theoretical underpinnings of federalism, the Court repeated its rejection of the "dual sovereignty" concept, holding that "States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."⁷⁶

Garcia's dissenting Justices, three of whom had been in the majority in *National League of Cities*, made two predictions that bear noting. The first, that the decision in *Garcia* meant the end of the States as we know them,⁷⁷ proved as overblown as the similar hyperbole employed by Justice Brennan dissenting in *National League of Cities*.⁷⁸ The second prediction—that *Garcia* itself would soon be overruled⁷⁹—not only was more striking than the first but also proved more accurate. While *Garcia* was reaffirmed in *South Carolina v. Baker* and has never been formally rejected, the Court quite quickly got back into the business of enforcing federalism limits on Congress, first by imposing a strong version of the interpretive

75. 485 U.S. 505 (1988).

76. *Id.* at 512.

77. Justice Powell complained that "the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy," 469 U.S. at 575 (Powell, J., dissenting), and predicted that the Court's decision will "enable 'the National Government [to] devour the essentials of state sovereignty.'" *Id.* at 579 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)); see also *id.* at 572 (predicting "emasculat[i]on of the powers of the States"); *id.* at 577 ("The Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country . . ."). Justice O'Connor, with a noted lack of interbranch comity, warned: "With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." *Id.* at 588 (O'Connor, J., dissenting).

78. See *supra* note 45 and accompanying text.

79. Justice Rehnquist, referring to the *National League of Cities* limit on congressional power, stated: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." 469 U.S. at 580 (Rehnquist, J., dissenting). Justice O'Connor echoed that view, stating that "I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice Rehnquist's belief that this Court will again in time assume its constitutional responsibility." *Id.* at 589 (O'Connor, J., dissenting).

policy of clear statement in *Gregory v. Ashcroft*,⁸⁰ and then by returning to Tenth Amendment protection for state sovereignty in *New York v. United States*⁸¹ and *Printz v. United States*.⁸² As discussed below, these cases taken together come quite close to overruling *Garcia* sub silentio.

B. INTERPRETIVE LIMITS ON NATIONAL LAWMAKING:
GREGORY V. ASHCROFT AND THE POLICY OF CLEAR
STATEMENT

In *Gregory v. Ashcroft*,⁸³ the Court addressed the question whether the Age Discrimination in Employment Act (ADEA) prohibited states from establishing a mandatory retirement age for their judges. The case turned on whether appointed judges were "employees" protected by the statute, or instead fit within an exception from coverage for "appointee[s] on the policymaking level."⁸⁴ While perhaps not easy, this question could have been addressed according to ordinary principles of statutory construction.⁸⁵ Instead, the Court created an extraordinarily strong clear statement rule that requires Congress to state with "absolute" clarity its intent to regulate at least some state functions. Finding no such clarity, the Court held that the ADEA's prohibition on mandatory retirement does not apply to appointed state judges.

The ADEA prohibits an "employer" from discharging a covered employee⁸⁶ "because of such individual's age."⁸⁷ In

80. 501 U.S. 452 (1991); see *infra* Part II.B.

81. 505 U.S. 144 (1992).

82. 521 U.S. 898 (1997).

83. 501 U.S. 452 (1991).

84. 29 U.S.C. § 630(f) (1994).

85. Justice White, for example, agreed with the majority that the ADEA did not cover appointed state judges, but did so "based on simple statutory construction," 501 U.S. at 481 (White, J., concurring in part, dissenting in part, and concurring in the judgment), and only after rejecting the majority's clear statement rule. See *id.* at 474 (describing the rule as "unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound"). Justice Blackmun likewise relied on ordinary principles of statutory construction but reached the opposite result, concluding that appointed state judges are not "appointee[s] on the policymaking level" and therefore are protected by the ADEA. See *id.* at 481 (Blackmun, J., dissenting); see also William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 623-24 (1992) (suggesting that the case "should have been resolved through well-established canons and conventional statutory interpretive approaches").

86. The ADEA covers "individuals who are at least 40 years of age." 29

1974, Congress redefined "employer" to include "a State or political subdivision of a State."⁸⁸ At the same time, Congress excluded from the definition of "employee" all elected officials, their personal staffs and certain advisers, and "appointee[s] at the policymaking level."⁸⁹ In *Ashcroft*, several state judges in Missouri sued the governor to prevent enforcement of a provision in the Missouri Constitution that required them to retire at age seventy,⁹⁰ on the ground that enforcement would violate the ADEA. The governor responded that judges fall within the exception for "appointee[s] at the policymaking level," and that requiring judges to retire at seventy is therefore consistent with the ADEA. In light of *Garcia*, the governor did not argue that applying the ADEA to state judges would impermissibly interfere with state sovereignty and thus violate the Tenth Amendment.⁹¹

Justice O'Connor's majority opinion in *Ashcroft* began not with a parsing of the relevant statutory provisions but with an encomium to the virtues of federalism. Professing to describe what "every schoolchild learns," she described "a system of dual sovereignty between the States and the Federal Government."⁹² She then cataloged the benefits secured by that system, including the ability to tailor the law to local tastes and conditions, the creation of a market for government services and hence both competition for citizens and regulatory innova-

U.S.C. § 631(a).

87. *Id.* § 623(a).

88. *Id.* § 630(b)(2).

89. *Id.* § 630(f). As amended, § 630(f) provides in relevant part:

The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

90. The Missouri Constitution provides that "[a]ll judges other than municipal judges shall retire at the age of seventy years." MO. CONST. art. V, § 26.

91. The parallels between the prohibition on mandatory retirement in the ADEA and the wage and overtime provisions of the FLSA (considered in *National League of Cities* and *Garcia*) are obvious. Nonetheless, in *EEOC v. Wyoming*, 460 U.S. 226 (1983), which was decided after *National League of Cities* and before *Garcia*, the Court upheld the ADEA as applied to state game wardens involuntarily retired at age fifty-five under state law. After *EEOC v. Wyoming* and *Garcia*, the claim that application of the ADEA to state employees violated the Tenth Amendment appeared to be foreclosed.

92. 501 U.S. at 457.

tion, the increased opportunities for citizen involvement in government, and the protection against abuses of government power.⁹³ By referring to the intellectual case for federalism,⁹⁴ a case made by neither *National League of Cities* nor *Garcia*, Justice O'Connor took an important first step in explaining why the Supreme Court should expend energy protecting states from the nation. If federalism does what she claims, and if vital states are essential to the federal system, then Supreme Court efforts to ensure that the states remain vital make sense.

The next step for Justice O'Connor was to explain that Missouri's decision concerning the qualifications of its judges—that they must retire at age seventy—is a decision of the most fundamental sort for a sovereign entity.⁹⁵ “Congressional interference with this decision,” she continued, “would upset the usual constitutional balance of federal and state powers.”⁹⁶ The logical conclusion of this argument, of course, would have been to hold that by interfering with a decision that goes to the heart of states' sovereignty, the ADEA violated the Constitution by threatening the continued vitality of states and thus the benefits of our federal system. Justice O'Connor's analysis, in other words, suggested the reinstatement of *National League of Cities*. Rather than doing so, however, and fulfilling the prediction of the *Garcia* dissenters,⁹⁷ Justice O'Connor and the *Ashcroft* majority opted for a special rule of interpretation, one designed to avoid the constitutional difficulties created by congressional encroachment. When Congress seeks to “upset the usual constitutional balance of federal and state powers,” the Court held, its intent to do so must be “unmistakably clear

93. See *id.* at 458.

94. Justice O'Connor cited Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987), and Merritt, *supra* note 44, at 3-10. See *Ashcroft*, 501 U.S. at 458.

95. 501 U.S. at 460. The claim that setting the retirement age for judges is fundamental to state sovereignty is hardly self-evident, particularly given the far greater intrusion on the state judiciary permitted by *Testa v. Katt*, 330 U.S. 386 (1947) (holding that the national government may require state courts to enforce federal statutes).

96. 501 U.S. at 460.

97. See *supra* note 79 and accompanying text.

in the language of the statute."⁹⁸ In fact, that intent "must be plain to *anyone* reading the Act."⁹⁹

The Court justified this extraordinary rule of construction on the startling grounds that congressional power under the Supremacy Clause is "an extraordinary power in a federal system," and that it is "a power that we must assume Congress does not exercise lightly."¹⁰⁰ Contrary to these assertions, one might reasonably conclude that the supremacy of national law is essential to the American federal system, rather than an aberration,¹⁰¹ and that at least since the New Deal Congress has not been terribly hesitant to rely on the Supremacy Clause to preempt state law.

One matter left unclear by *Ashcroft* was the relationship between its new, federalism-driven clear statement rule and the process-based approach of *Garcia*. The *Ashcroft* majority portrayed the two as complementary: "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."¹⁰² By forcing Congress to confront federalism concerns directly before intruding on state sovereignty, the Court might have continued, the new clear statement rule simply enhances the political process upon which states must rely for protection. One difficulty with this reading of *Ashcroft*, however, is that even if the ADEA were read to apply (or explicitly applied) to appointed state judges, *Garcia* strongly suggests that such application would be constitutional. If Congress may set wages and hours of state employees engaged in core governmental functions, then surely it may prohibit age discrimination against core state employees. What, then, is the constitutional question that the clear statement rule permits the Court to avoid? An alternative reading of *Ashcroft* is that the Court's opinion significantly undermines the political process approach of *Garcia* by calling into question congressional authority to do what *Garcia* almost certainly would have permitted.¹⁰³ This understanding of *Ashcroft* gains

98. 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

99. *Id.* at 467 (emphasis added).

100. *Id.* at 460.

101. See Eskridge & Frickey, *supra* note 85, at 624.

102. 501 U.S. at 464.

103. See Yoo, *supra* note 2, at 1337-38.

force in light of the Court's return to protecting state sovereignty in *New York v. United States*¹⁰⁴ and *Printz v. United States*.¹⁰⁵

C. BACK TO SOVEREIGNTY: AUTONOMY LIMITS ON NATIONAL AUTHORITY IN *NEW YORK* AND *PRINTZ*

Just one year after clearing its throat in *Ashcroft*, the Court in *New York v. United States* firmly announced its return to the business of protecting states from national encroachment. In establishing its new role, both in *New York* and then again in *Printz*, the Court professed to distinguish *Garcia* but in fact cut the legs out from under that case's political process approach while embracing the "dual federalism" or state-sovereignty model it had abandoned twice before. Without saying so, *New York* and *Printz* fulfilled the promise of the *Garcia* dissenters by marking a return to the approach of *National League of Cities*.

At issue in *New York v. United States* were portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985.¹⁰⁶ Based on a concern "that the Nation would be left with no disposal sites for low level radioactive waste,"¹⁰⁷ the Act established three sets of "incentives" designed to ensure that every state, either alone or in concert with other states, developed access to adequate disposal facilities. These incentives took the form of (1) rewarding with cash states that met statutory deadlines;¹⁰⁸ (2) authorizing states with disposal facilities to assess surcharges against, and ultimately exclude, states that failed to develop disposal plans of their own;¹⁰⁹ and (3) requiring states that failed to meet the final deadline for developing adequate disposal capacity to take title to, and assume liability for, low-level radioactive waste developed within their borders.¹¹⁰ The Court upheld the first two sets of incentives, but struck down the "take title" provision on the ground that it "compel[led] the States to enact a federal regulatory program" and thus impermissibly interfered with state sovereignty.¹¹¹

104. 505 U.S. 144 (1992).

105. 521 U.S. 898 (1997).

106. 42 U.S.C. § 2021-2021b (1994).

107. 505 U.S. at 150.

108. See 42 U.S.C. § 2021e(d)(2).

109. See *id.* § 2021e(e)(2)(A).

110. See *id.* § 2021e(d)(2)(C).

111. 505 U.S. at 188.

Justice O'Connor again wrote for the majority. After reviewing the facts and the relevant statutory provisions, she quickly established that, despite *Garcia*, the Court would have a substantial role in "ascertaining the constitutional line between federal and state power."¹¹² Describing that task as "perhaps our oldest question of constitutional law,"¹¹³ she explained that historically the Court had used two methods of drawing the constitutional line:

In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment.¹¹⁴

These two inquiries, she continued, are:

mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.¹¹⁵

The first part of Justice O'Connor's "mirror image" claim—that the powers delegated to Congress by the Constitution cannot be trumped by the Tenth Amendment—tracks *Darby's* conception of that amendment as "but a truism that all is retained which has not been surrendered."¹¹⁶ Justice O'Connor goes on, however, to reinvest the Tenth Amendment with independent constraining force, drawing an analogy to the First Amendment¹¹⁷ and echoing the approach of pre-1937 cases like

112. *Id.* at 155. "At least as far back as *Martin v. Hunter's Lessee* [14 U.S. (1 Wheat.) 304 (1816)], the Court has resolved questions 'of great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *Id.* (emphasis added).

113. *Id.* at 149.

114. *Id.* at 155 (citations omitted).

115. *Id.* at 156.

116. *United States v. Darby*, 312 U.S. 100, 124 (1941), quoted in *New York*, 505 U.S. at 156.

117. See *New York*, 505 U.S. at 156-57:

Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance,

Hammer v. Dagenhart.¹¹⁸ Once the Tenth Amendment is given this sort of substantive content, the second part of Justice O'Connor's "mirror image" claim—that "it makes no difference"¹¹⁹ whether the Court engages in a "checklist" review of enumerated powers or looks for state sovereignty limits on power otherwise granted—is simply incorrect.¹²⁰ Suppose, for example, a federal law authorizing warrantless searches of defense contractors. Asking whether the law is within Congress's enumerated powers would be quite different from asking whether the law is consistent with the Fourth Amendment, and the two questions almost certainly would yield different answers. Indeed, in both *National League of Cities* and *New York* itself, the Court effectively acknowledged the difference between the two inquiries, holding that despite Congress's authority under the Commerce Clause to regulate the wages and hours of private employees (in *National League of Cities*) and the disposal of radioactive waste (in *New York*), constitutional protection of state sovereignty nonetheless prohibited the regulation in question.

For present purposes, the more important aspect of *New York*'s "mirror image" analysis is its premise that whichever question is asked—does the law fit within an enumerated power or does it violate state sovereignty—the Court, and not Congress, will provide the authoritative answer. This premise is irreconcilably at odds with *Garcia*'s conclusion that states must look to the political process, and not the courts, for protection from national encroachment. The *New York* majority made no attempt to argue that the statutory provisions in question resulted in any way from a failure in the political process.¹²¹

reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

118. 247 U.S. 251 (1918), *overruled in part* by *United States v. Darby*, 312 U.S. 100 (1941).

119. 505 U.S. at 159.

120. For other critical assessments, see Martin H. Redish, *Doing It with Mirrors*: *New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593 (1994).

121. Indeed, as Justice White spelled out in dissent, the statutory scheme grew out of a political process in which the states not only were involved but in fact were the prime architects. See *New York*, 505 U.S. at 189-94 (White, J., concurring in part and dissenting in part). At one point in its opinion, the Court did argue that commandeering diminishes the accountability of public officials, see *id.* at 168-69, but never linked that argument to the political

Justice O'Connor and the *New York* majority dealt with *Garcia* by declaring it irrelevant. While *Garcia* had "concerned the authority of Congress to subject state governments to generally applicable laws," the Court observed, *New York* involved legislation directed specifically at the states.¹²² *New York* therefore "present[ed] no occasion to apply or revisit" *Garcia*.¹²³ Unfortunately, the Court made no effort to explain why its distinction—between generally applicable laws and laws regulating only states—should make a difference. No recent Tenth Amendment case, including the supposedly abandoned *National League of Cities*, had rested on such a distinction. Moreover, as Justice White said in dissent:

An incursion on state sovereignty hardly seems more constitutionally acceptable if the federal statute that "commands" specific action also applies to private parties. The alleged diminution in state authority over its own affairs is not any less because the federal mandate restricts the activities of private parties.¹²⁴

After dispatching *Garcia* with barely a mention, the Court announced what Congress may and may not do in terms of regulating the states. Congress has the authority to "encourage" states to regulate in a particular way by either offering financial incentives under its spending power or threatening to regulate directly absent state cooperation.¹²⁵ Such encouragement, as long as it stops "short of outright coercion,"¹²⁶ leaves "the residents of the State [with] the ultimate decision as to whether or not the State will comply."¹²⁷ Direct coercion, in contrast, impermissibly trenches on state sovereignty and is therefore unconstitutional. "Congress may not simply 'commandeer' the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹²⁸ Applying these standards to the statutory scheme

process approach of *Garcia*.

122. 505 U.S. at 160.

123. *Id.* at 160.

124. *Id.* at 201-02 (White, J., concurring in part and dissenting in part). The Court failed to note an available political process justification for the distinction. In the case of a proposed law of general applicability, state interests gain a measure of protection from the lobbying efforts of private parties that may be subject to the same law. States get no such benefit in the case of laws that do not apply to private parties. For an elaboration of this argument, made before *New York* was decided, see La Pierre, *supra* note 50, at 648-51.

125. See *New York*, 505 U.S. at 166-68.

126. *Id.* at 166.

127. *Id.* at 168.

128. *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation*

before it, the Court held that the first two sets of incentives amounted to authorized encouragement but that the "take title" provisions, by "cross[ing] the line distinguishing encouragement from coercion,"¹²⁹ violated the Tenth Amendment.

Justice O'Connor understandably made no attempt to justify the Court's "no-commandeering" rule in terms of the Constitution's text, since the only possible home for such a rule—the Tenth Amendment—makes no explicit or implicit reference to the subject.¹³⁰ Instead, she defended the rule by reference to recent Tenth Amendment precedent, the framers' intent, and political accountability. Even brief examination reveals that none of the three provides much support for the rule. In terms of precedent, Justice O'Connor relied chiefly on *Hodel v. Virginia Surface Mining & Reclamation Ass'n*¹³¹ and *FERC v. Mississippi*.¹³² *Hodel's* reference to commandeering was a rejection of a litigant's characterization of the law in question, not an announcement of a constitutional rule.¹³³ While it did not re-

Ass'n, 452 U.S. 264, 288 (1981)).

129. *Id.* at 175.

130. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Justice O'Connor acknowledged that the Court's view that the Tenth Amendment "restrains the power of Congress . . . is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology." 505 U.S. at 156-57.

131. 452 U.S. 264 (1981).

132. 456 U.S. 742 (1982). For an extended examination of the *New York* Court's use of *Hodel* and *FERC* as precedent, see Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 U. KAN. L. REV. 493, 502-12 (1993).

133. The *Hodel* Court's reference to commandeering was part of its effort to demonstrate that the statute in question—the Surface Mining Act—did not regulate "States as States" and therefore did not meet the first of the *National League of Cities* requirements. See *Hodel*, 452 U.S. at 287. Read in context, the "commandeering" reference plainly did not establish a constitutional rule against commandeering:

As the District Court itself acknowledged, the steep-slope provisions of the Surface Mining Act govern only the activities of coal mine operators who are private individuals and businesses. Moreover, the States are not compelled to enforce [those provisions], to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a state does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

ject the idea of a no-commandeering rule, *Hodel* likewise did not support Justice O'Connor's characterization of such a rule as an "established . . . principle[]."¹³⁴

FERC provided even less support for a no-commandeering rule. In fact, the Court in *FERC* actually upheld congressional authority to compel a state regulatory commission to implement a specific federal policy, and expressly reserved the question of the scope of such authority outside the adjudicatory context: "[I]t plainly is not necessary for the Court in this case to make a definitive choice between competing views of federal power to compel state regulatory activity."¹³⁵ What the Court in *FERC* chose not to decide, Justice O'Connor described *FERC* as having clearly established.¹³⁶ Moreover, both *Hodel* and *FERC* were decided under the since-discredited *National League of Cities* framework, before *Garcia* adopted a political process approach to state sovereignty claims.¹³⁷

Id. at 288.

134. *New York*, 505 U.S. at 161.

135. *FERC*, 456 U.S. at 764.

136. Justice O'Connor accomplished this feat with a creative use of quotation that would have made a movie promoter proud. She quoted *FERC* as standing for the proposition that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." 505 U.S. at 161 (quoting *FERC*, 456 U.S. at 761-62). The full sentence in *FERC*, the function of which was to *disprove* the concept that "the States and the Federal Government in all circumstances must be viewed as coequal sovereigns," 456 U.S. at 761, read as follows:

While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.

456 U.S. at 761-62 (citation omitted). In support, the *FERC* Court then cited three cases that all cut against a no-commandeering rule: *Fry v. United States*, 421 U.S. 542 (1975), which upheld congressional authority to require state executives to abide by the wage and salary limitations established by the Economic Stabilization Act of 1970; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979), which acknowledged federal power to enforce a treaty by compelling a state agency to "prepare" certain rules "even if state law withholds . . . the power to do so"; and *Testa v. Katt*, 330 U.S. 386 (1947), which upheld the authority of the federal government to require state judiciaries to enforce federal law.

137. Even if *FERC* supported a no-commandeering rule, the Court's 1988 opinion in *South Carolina v. Baker*, 485 U.S. 505 (1988), observed that "[t]he extent to which the Tenth Amendment claim left open in *FERC* survives *Garcia* or poses constitutional limitations independent of those discussed in *Garcia* is far from clear." *Id.* at 513.

Justice O'Connor's historical defense of the no-commandeering rule was as strained as her reliance on precedent. The historical record, which has been explored thoroughly by others,¹³⁸ is at best inconclusive. Justice O'Connor rested her case largely on comments from a host of framers describing the importance of having a national authority that could operate directly on the people, rather than through the states as under the Articles of Confederation.¹³⁹ Typical of the comments relied on are the following offered by Hamilton in *The Federalist No. 15*:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist. . . .

....

[W]e must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government.¹⁴⁰

Contrary to Justice O'Connor's analysis, these comments had little to do with protection of state sovereignty. Hamilton's defense of direct regulatory authority for Congress, born out of a conviction that the national government needed *more* authority than it had under the Articles of Confederation, cannot fairly be read as an effort to eliminate congressional authority over the states. Justice O'Connor offered no evidence that such authority, which existed under the Articles of Confederation,

138. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995) (rejecting the claim that originalist or formalist analysis supports the no-commandeering rule); Levy, *supra* note 132, at 517 (reviewing evidence of framers' intent and describing it as "far from conclusive"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 681 (1993) ("The autonomy of process principle O'Connor has articulated was not clearly chosen by the founders; indeed, there is some evidence that the Constitution's proponents expressly rejected the concept."); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (arguing that the framers intended to permit coercion of state executive and judicial officers, but not state legislatures); Yoo, *supra* note 2, at 1357-91 (concluding that the framers intended judicial review of the balance of power between state and local governments, but not addressing the precise contours of that review).

139. See *New York*, 505 U.S. at 163-66.

140. THE FEDERALIST NO. 15, at 108-09 (Alexander Hamilton) (Clinton Rossiter ed., 1961), *quoted in New York*, 505 U.S. at 163.

was inconsistent with additional authority to regulate private activity directly.

Moreover, Hamilton and other influential framers clearly contemplated that states would implement federal law.¹⁴¹ In *The Federalist* Nos. 36 and 45, Hamilton and Madison respectively suggested Congress could use state officers to collect federal taxes.¹⁴² In *The Federalist* No. 27, Hamilton explained that the Constitution would authorize Congress to act *both* directly on individuals *and* through state legislatures:

The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws. It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State It merits particular attention in this place, that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.¹⁴³

In her opinion for the Court in *New York*, Justice O'Connor completely ignored these and other similar statements,¹⁴⁴

141. For a thorough discussion of the relevant historical evidence, see Powell, *supra* note 138, at 659-64.

142. See THE FEDERALIST NO. 36, at 220 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The national legislature can make use of the *system of each state within that State*. The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government."); THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (collection of federal taxes, if levied, "will generally be made by the officers, and according to the rules, appointed by the several States").

143. THE FEDERALIST NO. 27, at 176-77 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 140 (Jonathon Elliot ed., 2d ed. 1876) ("The [national] laws can, in general, be executed by the officers of the states. State courts and state officers will, for the most part, probably answer the purpose of Congress as well as any other.") (statement of William McClaine at North Carolina Ratifying Convention).

144. Justice O'Connor had addressed these statements in her separate opinion in *FERC*, arguing that they did not support commandeering but instead "seemed to assume that the States would consent to national use of their officials." 456 U.S. at 796 n.35 (O'Connor, J., concurring in part and dis-

which come "remarkably close to a point-by-point refutation of [her] views."¹⁴⁵ While the historical evidence may not demonstrate conclusively that the framers endorsed compelled state implementation of national policy, it offers precious little to support the Court's no-commandeering rule. In short, the Court's use of the historical record in *New York* is best understood as a strained attempt to defend a rule that lacked textual or precedential support.

Justice O'Connor's final defense of the no-commandeering rule was that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."¹⁴⁶ She explained that where the national government regulates directly,

[it] makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.¹⁴⁷

Unlike the purely formal state sovereignty arguments made earlier, this claim is a functional one,¹⁴⁸ flowing from concern that commandeering is the product of a flawed political process. Played out in terms of *Garcia*, something the *New York* Court did not do, the argument would be that if federal policymakers are able to avoid the electoral consequences of their policy choices by shifting apparent (but not real) responsibility for those choices to state officials, then the ordinary constraints of the political process will not operate and states will be inadequately protected.

Justice O'Connor's accountability analysis suffers from several fatal difficulties. First, given the substantial overlap between state and national authority—*Cooley v. Board of War-*

senting in part). While the statements do not necessarily preclude Justice O'Connor's reading, nor do they provide any support for it. Saikrishna Prakash has argued persuasively that "[w]hen Madison and Hamilton discussed federal benefits of state commandeering, they contemplated a system in which the federal government has a 'right' to compel state officers to enforce federal law." Prakash, *supra* note 138, at 1999.

145. Powell, *supra* note 138, at 663.

146. *New York*, 505 U.S. at 168.

147. *Id.* at 168-69.

148. For an analysis of the formal and functional components of the Court's federalism jurisprudence, see Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997).

*dens*¹⁴⁹ put to rest the notion of mutually exclusive power—some blurring of accountability is an inevitable byproduct of our federal system. To the extent that commandeering actually causes accountability problems, permissible “encouragement” of state officials to implement federal policy logically generates similar problems. When federal officials persuade the states to regulate, through either financial incentives or preemption threats, then those federal officials “may remain insulated from the electoral ramifications of their decision”¹⁵⁰ at least to the same extent that they would were they to compel the states to regulate. Indeed, use of persuasion rather than coercion might make escaping electoral accountability easier for federal officials, since the ultimate decision in fact would be made by the states.¹⁵¹ Second, the accountability argument rests entirely on the unsupported empirical premise that voters will be unable to determine what level of government is responsible for a particular program or policy, thus permitting federal officials to escape deserved blame. This view assumes not only a startling level of citizen ignorance,¹⁵² but also that state and local officials are incapable of informing their constituents when “Washington” is really responsible for a particular policy or outcome. Finally, even if the Court’s empirical assumptions have some basis in reality, they remain a strikingly slender reed on which to rest a constitutional rule that precludes an entire category of federal legislation.

New York, like *National League of Cities*, identified a protected enclave of state sovereignty and declared it off-limits to national regulation. Also like *National League of Cities*, *New York* failed to link its doctrinal innovation to any practical benefit secured by the federal structure it purported to protect.

149. 53 U.S. (12 How.) 299 (1851) (establishing that much of “interstate commerce” is subject to regulation by both state and national governments).

150. 505 U.S. at 169.

151. Justice O’Connor’s opinion also referred to the accountability of state officials, *see id.* at 168 (“Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people.”), but never explained how federal coercion diminishes the need of state officials to respond to their constituents. Moreover, to the extent that the accountability argument is an attempt to describe a political process failure within the meaning of *Garcia*, the political process at issue is federal, not state. *See Levy, supra* note 132, at 529-30.

152. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting) (“[T]he American people love democracy and the American people are not fools.”).

Indeed, Justice O'Connor expressly denied the relevance of any such link:

The benefits of this federal structure have been extensively cataloged elsewhere, but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution.¹⁵³

But this avowedly formalistic approach¹⁵⁴ belies an obvious belief that federalism *does* secure advantages, that it is "our preferred system of government." Later in her opinion, Justice O'Connor wrote that "State sovereignty is not just an end in itself," explaining that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."¹⁵⁵ Her argument never proceeded from there, however. While she repeated that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front,"¹⁵⁶ she never explained just how the no-commandeering rule materially contributes to a healthy balance of power.¹⁵⁷ Given the lack of textual, historical and precedential support for the rule, the absence of any articulated practical justification raises starkly the question why the Court is working so hard to limit national power.

The Court's June 1997 decision in *Printz v. United States*,¹⁵⁸ while making clear the breadth of *New York's* no-commandeering rule, did little to shore up the rule's intellectual foundation. The Court's five-member majority "categorically" concluded that "[t]he Federal Government may not compel the states to enact or administer a federal regulatory program."¹⁵⁹ Relying on precisely the arguments made in *New York*, the Court offered no new justification for the no-commandeering rule other than the precedential value of *New York* itself.

153. 505 U.S. at 157 (citations omitted).

154. See *id.* at 187 (admitting that "[t]he result may appear 'formalistic'").

155. *Id.* at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

156. *Id.* at 181-82 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

157. For an analysis of the relationship between the no-commandeering rule and the practical benefits of federalism, see *infra* Part III.B.1.a.

158. 521 U.S. 898 (1997).

159. *Id.* at 933 (quoting *New York*, 505 U.S. at 188).

At issue in *Printz* was the constitutionality of that portion of the Brady Handgun Violence Prevention Act¹⁶⁰ that required local law enforcement officials to perform criminal records checks on prospective handgun purchasers. The Act directed the Attorney General to establish a national system for performing instant background checks by November 30, 1998.¹⁶¹ In the interim, the Act required the chief law enforcement officer in the area (CLEO), using information provided to the handgun dealer by the prospective purchaser, to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law."¹⁶² No background check would be necessary, and the handgun dealer could make the sale immediately, if state law provided for an instant background check¹⁶³ or if the purchaser possessed a state handgun permit issued following a background check.¹⁶⁴ In addition, the Act provided that CLEOs need not perform background checks if local conditions made them "impracticable."¹⁶⁵ Two CLEOs, Jay Printz of Ravalli County, Montana, and Richard Mack of Graham County, Arizona, filed separate declaratory judgment actions claiming that by pressing them into federal service, the Brady Act's interim provisions unconstitutionally interfered with state sovereignty. In each case, the federal district court held that the compelled background check violated the Tenth Amendment.¹⁶⁶ In a con-

160. Pub. L. No. 103-159, §§ 101-106, 107 Stat. 1536-44 (1993) (codified at 18 U.S.C. §§ 921-925A (1994); 42 U.S.C. § 3759 (1994)).

161. See 18 U.S.C. § 922 note (creating National Instant Criminal Background Check System).

162. *Id.* § 922(s)(2). The Act defined "reasonable effort" to include "research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." *Id.* The Act provided that if the prospective purchaser passed the background check, the CLEO would have to destroy all records relating to his or her research, including the information provided by the handgun dealer. See *id.* § 922(s)(6)(B)(i). If the prospective purchaser failed the background check, the Act did not require the CLEO to take any particular action (such as preventing the sale) other than to provide the would-be purchaser with a written explanation upon request. See *id.* § 922(s)(6)(C).

163. See *id.* § 922(s)(1)(D).

164. See *id.* § 922(s)(1)(C).

165. *Id.* § 922(s)(1)(F).

166. See *Mack v. United States*, 856 F. Supp. 1372, 1383-84 (D. Ariz. 1994), *rev'd in part*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.* *Printz v. United States*, 521 U.S. 898 (1997); *Printz v. United States*, 854 F. Supp. 1503, 1519 (D. Mont. 1994), *rev'd in part sub nom.* *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *rev'd*, *Printz v. United States*, 521 U.S. 898 (1997).

solidated appeal, the Ninth Circuit reversed both decisions, concluding that unlike the statutory scheme in *New York*, the Brady Act's background check requirement did not direct states or their subdivisions "to engage in the central sovereign processes of enacting legislation or regulations," and therefore was consistent with the Constitution.¹⁶⁷

The Supreme Court disagreed. Justice Scalia, writing for the majority, first conceded that the language of the Constitution, including the Tenth Amendment, does not address the commandeering issue. "[T]here is no constitutional text speaking to this precise question."¹⁶⁸ As a result, he said, "the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."¹⁶⁹ In the end, after somewhat half-hearted (though extended) discussions of history and structure, the Court's opinion relied on *New York* and little more.

In terms of history, Justice Scalia's analysis consisted in large part of attacking the government's historical claims, rather than making an affirmative case for the no-commandeering rule. The government pointed to statutes enacted by the First Congress as evidence that federal use of state government machinery was consistent with the contemporary understanding of the Constitution.¹⁷⁰ Justice Scalia responded that "[t]hese early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions."¹⁷¹ The government also relied on those portions of *The Federalist*, discussed above,¹⁷² anticipating federal use of state officials to implement federal policy.¹⁷³ Justice Scalia's notably qualified answer was that "none of these statements *necessarily implies* . . . that Congress could impose these responsibili-

167. *Mack*, 66 F.3d at 1031.

168. *Printz*, 521 U.S. at 905.

169. *Id.* In contrast to *Printz*, Justice O'Connor's opinion for the Court in *New York* relied heavily on the Tenth Amendment itself. While Justice O'Connor first described the amendment as nothing more than a "mirror image" of Congress's enumerated powers, she then went on to invest the amendment with independent constraining force. See *supra* notes 115-20 and accompanying text.

170. See *Printz*, 521 U.S. at 905-07.

171. *Id.* at 907.

172. See *supra* notes 140-43 and accompanying text.

173. See *Printz*, 521 U.S. at 910.

ties without the consent of the States. They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government."¹⁷⁴ Ultimately, Justice Scalia's treatment of the historical record reduces to an effort to make that record a non-factor: "The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but it is not conclusive."¹⁷⁵

Turning to the Constitution's structure, Justice Scalia seemed somewhat more certain of his conclusions. He began with the "incontestible" assertion that "the Constitution established a system of 'dual sovereignty'" under which the states "retained 'a residuary and inviolable sovereignty.'"¹⁷⁶ Tracking Justice O'Connor's discussion of the perceived flaws in the Articles of Confederation, Justice Scalia argued that when the Constitution granted the national government authority to act directly on the people, it removed the national government's authority to use the states as instruments of federal governance.¹⁷⁷ He offered no new evidence in support of this assertion, and relied entirely on the precedential authority of *New York* to respond to the obvious point that the Constitution augmented rather than diminished the preexisting powers under the Articles.¹⁷⁸

Justice Scalia made two additional structural arguments. First, he repeated the observation made in *Gregory* and *New York* that federalism protects liberty by dividing power between the states and the national government.¹⁷⁹ But again like those earlier cases, he made no effort to link the particular

174. *Id.* at 910-11 (first and final emphasis added) (citing *FERC v. Mississippi*, 456 U.S. 742, 796 n.35 (1982) (O'Connor, J., concurring in part and dissenting in part)). Of particular note is Justice Scalia's extraordinarily strained parsing of *The Federalist No. 27*. See *id.* at 911. As Justice Souter ably explained in dissent, the "natural reading" of the relevant passage in No. 27 is that the national government will have the authority to incorporate state officials, who have taken an oath to uphold the Constitution and laws of the United States, into the service of the national government. See *id.* at 971 (Souter, J., dissenting).

175. *Id.* at 918 (emphasis added). That *Printz* effectively abandoned historical argument as support for the no-commandeering rule further reveals the weakness of the historical claims made for the rule in *New York*.

176. *Id.* at 918-19 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

177. See *id.* at 919-20.

178. See *id.* at 920 n.10.

179. See *id.* at 920-21.

rule laid down to the protection of liberty. Second, he argued that commandeering would "have an effect upon" the separation of powers by allowing Congress to bypass the President and use the States to execute federal law.¹⁸⁰ Whether or not Justice Scalia offered this unitary-executive argument¹⁸¹ as an independent ground for invalidating the background check provisions of the Brady Act, the argument proves too much. Whether Congress impermissibly coerces or permissibly encourages states to implement federal law, the President's control over execution of that law is equally diminished.

None of the structural arguments for the no-commandeering rule offered in *Printz* is compelling. While the Constitution's preservation of some measure of state independence may be "incontestible," the significance of that observation for the judicial enforcement of federalism is quite contestable. To say that states have "a residuary and inviolable sovereignty"¹⁸² is to say almost nothing at all about the nature or extent of that sovereignty.¹⁸³ Indeed, when Madison used the phrase he was referring only to those aspects of government outside the national government's enumerated powers.¹⁸⁴ Given *Printz*'s implicit concession that the regulation of handgun sales is within Congress's power,¹⁸⁵ the Brady Act does not touch Madison's "inviolable sovereignty."

Justice Scalia seemed to recognize the weakness of his historical and structural arguments by describing the result in *Printz* as resting "most conclusively" on precedent.¹⁸⁶ Here, at

180. *Id.* at 922.

181. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

182. 521 U.S. at 919 (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

183. See *id.* at 955 (Stevens, J., dissenting) ("The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations . . .").

184. In context, Madison's reference to inviolable sovereignty was as follows: "In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

185. Cf. *Printz*, 521 U.S. at 937 (Thomas, J., concurring) (suggesting that the commerce power "does not extend to the regulation of wholly *intrastate*, point-of-sale transactions").

186. See *id.* at 925.

last, the Court found firmer ground, as *New York's* statement of the no-commandeering rule—"the Federal Government may not compel the States to enact or administer a federal regulatory program"¹⁸⁷—comfortably covered the Brady Act's compelled background checks.¹⁸⁸ The government sought to avoid *New York* on the ground that the Brady Act required only state implementation as opposed to lawmaking, and therefore did not violate state sovereignty. Justice Scalia reasonably rejected this proposed distinction because the line between policymaking and "mere" implementation is impossible to draw,¹⁸⁹ because mandated implementation of federal law is perhaps more intrusive on state sovereignty than a scheme that allows for some state discretion,¹⁹⁰ and because the accountability concerns expressed in *New York* are present whether or not federal compulsion permits state discretion.¹⁹¹

Finally, the Court chose to ignore the inconvenient political process approach of *Garcia*. As Justice Stevens said in dissent: "The majority points to nothing suggesting that the political safeguards of federalism identified in *Garcia* need be supplemented by a rule, grounded in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law."¹⁹² The majority opinion did not respond to this claim but instead merely observed, just as the Court had in *New York*, that *Garcia* involved a generally applicable statute while the Brady Act was aimed only at state and local officials.¹⁹³ And again just like *New York*, the Court offered no reason to believe that the distinction it described should make a difference.

187. *New York v. United States*, 505 U.S. 144, 188 (1992) (emphasis added), quoted in *Printz*, 521 U.S. at 926.

188. Of course, the reference to *administering* federal programs was arguably a throw-away in *New York*, the heart of which concerned national intrusion on state legislative functions.

189. See *Printz*, 521 U.S. at 927.

190. See *id.* at 928 ("Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by 'reduc[ing] [them] to puppets of a ventriloquist Congress.'") (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)).

191. See *id.* at 929-30.

192. *Id.* at 957 (Stevens, J., dissenting).

193. See *id.* at 931.

The *Printz* opinion concluded with an effort to leave no doubt about its breadth:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.¹⁹⁴

Left unexpressed in this concluding passage, but made quite plain by both *New York* and *Printz*, is the Court's conviction that it, not Congress, has primary responsibility for both defining and protecting that system of dual sovereignty. The notion that state interests need no judicial protection because they are adequately protected in the national political process, expressed by Professors Wechsler and Choper and made law in *Garcia*, looks to be dead and buried. Of course the same was said of the state-sovereignty or "enclave" approach of *National League of Cities*, a version of which has reemerged in *New York* and *Printz*.

While the no-commandeering rule undercuts *Garcia*, even the broadly stated version in *Printz* stops short of fully reinstating *National League of Cities*. By their terms, *New York* and *Printz* would permit federal regulation of the wages and hours of state employees, as long as that regulation applies to private employers as well. In other words, those cases protect a narrower state enclave than the "core governmental functions" of *National League of Cities*. The no-commandeering rule may limit the range of means available to Congress, but it says little about the legitimacy of congressional ends. Only a Supreme Court effort to limit the reach of the Commerce Clause generally, which neither *New York* nor *Printz* undertook, could alter the post-New Deal reality that in an integrated, national economy, Congress has the authority to address just about any subject it wants, including intrastate disposal of waste and intrastate handgun sales.

194. *Id.* at 935.

D. COMMERCE CLAUSE LIMITS ON NATIONAL AUTHORITY:

UNITED STATES V. LOPEZ

In *United States v. Lopez*,¹⁹⁵ the Court ended a sixty-year run of upholding federal statutes against claims that they exceeded congressional authority under the Commerce Clause.¹⁹⁶ *Lopez* addressed the constitutionality of the Gun Free School Zones Act of 1990,¹⁹⁷ which made possession of a firearm within one thousand feet of a school a federal crime.¹⁹⁸ The Court, in a five to four decision, held that the Act was beyond Congress's authority to regulate commerce because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."¹⁹⁹ By ruling that Congress had exceeded its commerce power, *Lopez* opened up the possibility of a limit on national power much more significant than the no-commandeering rule of *New York and Printz*. In addition, *Lopez* underscored the demise of *Garcia* by treating the extent of congressional authority as a question for the courts rather than the political process.

After a largely unelaborated reference to "first principles,"²⁰⁰ Chief Justice Rehnquist's majority opinion traced the history of the Court's Commerce Clause jurisprudence to establish that there were, and are, "outer limits" on Congress's vast commerce power.²⁰¹ The opinion, like those in *Ashcroft*,

195. 514 U.S. 549 (1995).

196. See Fried, *supra* note 3, at 15 (identifying *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), as the last case striking down a federal statute as beyond Commerce Clause authority prior to *Lopez*).

197. 18 U.S.C. § 922(q)(1) (1994).

198. The Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* § 922(q)(1)(A). The term "school zone" is defined elsewhere as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." *Id.* § 921(a)(25).

199. 514 U.S. at 551.

200. The opinion offered as first principles the unchallengeable and nonderivative observations that the national government is one of limited, enumerated powers, see *id.* at 552 ("As James Madison wrote: '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'") (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)), and that the "constitutionally mandated division of authority" between the national and state governments "was adopted by the Framers to ensure protection of our fundamental liberties," *id.* at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

201. See *Lopez*, 514 U.S. at 553 (despite broad definition of the commerce

New York, and *Printz*, left no doubt that the Court once again had assumed responsibility for locating and policing those outer limits. So complete is the evisceration of *Garcia* that the majority never discussed the case,²⁰² and no dissenter suggested that the Court should leave protection of state interests to the political process. In fact, in an opinion joined by all four dissenters, Justice Breyer "recognize[d] that we must judge this matter independently."²⁰³ The dispute in *Lopez* was over how far Congress can go, not over who gets to decide.

In his effort to define the outer limits of congressional authority, Chief Justice Rehnquist did not openly question any "modern-era precedents which have expanded congressional power under the Commerce Clause,"²⁰⁴ and indeed expressly reaffirmed the Court's rational basis approach to reviewing exercises of such power.²⁰⁵ Instead, he read into cases like *Wickard v. Filburn*,²⁰⁶ *Katzenbach v. McClung*,²⁰⁷ and *Perez v. United States*²⁰⁸ a distinction between "commercial" and "noncommercial" activities, suggesting that Congress lacked (or possessed diminished) authority to regulate the latter.²⁰⁹ Be-

power in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), that case "acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause"; *id.* at 556-57 (even modern precedents confirm that the commerce power is subject to "outer limits").

202. The only reference to *Garcia* in the majority opinion was in a citation to *Maryland v. Wirtz* noting that that case had been overruled on other grounds by *National League of Cities*, which in turn had been overruled by *Garcia*. See *Lopez*, 514 U.S. at 557-58.

203. 514 U.S. at 617 (Breyer, J., dissenting).

204. *Id.* at 556.

205. See *id.* at 557 ("Since [*Jones & Laughlin Steel*], the Court has . . . undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.").

206. 317 U.S. 111 (1942) (upholding federal commerce power to regulate wheat grown for home consumption because of aggregate effect of all such wheat on interstate commerce).

207. 379 U.S. 294 (1964) (upholding application of federal anti-discrimination legislation to "local" restaurant because it served food a substantial portion of which had moved in interstate commerce, and because discrimination discouraged travel).

208. 402 U.S. 146 (1971) (holding that Congress has power under Commerce Clause to regulate purely local loansharking because it belongs to a "class of activities" that affects interstate commerce).

209. See *Lopez*, 514 U.S. at 559-61, 566-67. The Court offered a second arguable doctrinal innovation—that Congress may regulate only activity that "substantially affect[s]" interstate commerce. *Id.* at 559 (emphasis added). While several commentators have read the substantial effect test as a meaningful change in course, it is better understood as merely "repackaging a test

cause possession of a gun in a school zone, unlike growing wheat, operating a restaurant, or threatening violence to collect a debt, is not commercial behavior, he argued, the commerce power does not support its regulation.²¹⁰

The difficulties with *Lopez*'s commercial/noncommercial distinction are severalfold. First, while the leading post-New Deal Commerce Clause cases did involve commercial behavior, none relied on that fact to uphold the statute in question.²¹¹ Indeed, *Wickard* expressly held that although the consumption of home grown wheat "may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce."²¹² The focus in *Perez* and *McClung* was likewise not on the commercial nature of the activity regulated but rather on the effect of that activity on commerce. Second, the commercial/noncommercial distinction recalls the failed, formulaic line-drawing of cases like *Hammer v. Dagenhart*,²¹³ *Schechter Poultry*,²¹⁴ and *Carter Coal*.²¹⁵ Chief Justice Rehnquist himself seemed to acknowledge that his test was not terribly determinative, noting that "depending on the level of generality, any activity can be looked upon as commercial."²¹⁶ Moreover, more than fifty years ago the Court wisely abandoned as irrational and unworkable a Commerce Clause jurisprudence that turned on "any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon in-

that [the Court] has recited in virtually every Commerce Clause case decided since 1937." Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 CASE W. RES. L. REV. 671, 672 (1996).

210. See *Lopez*, 514 U.S. at 559-61.

211. See Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 564 (1995).

212. 317 U.S. at 125 (emphasis added).

213. 247 U.S. 251 (1918) (striking down a federal statute regulating child labor because the statute regulated "manufacturing" and not "commerce"), *overruled in part by United States v. Darby*, 312 U.S. 100 (1941).

214. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that Congress lacked authority to regulate activities that affect interstate commerce only "indirectly").

215. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down statute prohibiting unfair labor practices in coal industry on ground that it regulated "mining" and "production," not "commerce").

216. *Lopez*, 514 U.S. at 565.

terstate commerce."²¹⁷ Third, at least some activity deemed "noncommercial" is subject to national regulation. As Professor Don Regan has observed, "[s]urely Congress can regulate private sport-hunting of migratory birds or drunk driving on interstate highways or backyard incinerators if they are found to emit some airborne toxic chemical that is deposited hundreds of miles from the site of incineration."²¹⁸

The Court's application of the commercial/noncommercial distinction in *Lopez* was as problematic as the distinction itself. Given that guns are both articles of commerce and instruments used to further or impede commercial aims,²¹⁹ gun possession ought reasonably to be understood as commercial activity. The aggregation principle developed in *Wickard* and *Jones* was based in large part on a rejection of the artificial fragmentation of regulated activity. Once an enterprise is understood as part of an integrated whole, the distinction between manufacturing or agriculture and commerce becomes untenable. The *Lopez* Court, while professing to adhere to those earlier cases, effectively re-fragmented the activity in question by isolating gun possession from the commerce of which it is an undoubted part.

Both the government and Justice Breyer in dissent argued convincingly that post-1937 Commerce Clause precedents, conventionally understood, amply supported national regulation of guns in school zones.²²⁰ Relying on extensive literature reporting the unsurprising fact that school violence interferes with the quality of education,²²¹ and on the undoubted link between the quality of education and the economy,²²² Justice Breyer reasoned that Congress could have rationally concluded that gun possession in or near schools has a substantial effect on interstate commerce.²²³ Chief Justice Rehnquist did not challenge the logic of this analysis but rather rejected it because it "lacks any real limits."²²⁴ He accurately observed that it "would be equally applicable, if not more so, to subjects such

217. *Wickard*, 317 U.S. at 120.

218. Regan, *supra* note 211, at 564.

219. See *Lopez*, 514 U.S. at 602-03 (Stevens, J., dissenting).

220. See *id.* at 563-64 (summarizing government argument); *id.* at 615-31 (Breyer, J., dissenting).

221. See *id.* at 619.

222. See *id.* at 620-22.

223. See *id.* at 623-25.

224. *Id.* at 565.

as family law and direct regulation of education."²²⁵ Of the government's similar arguments, he said that "if we were to accept [them], we are hard pressed to posit any activity by an individual that Congress is without power to regulate."²²⁶

But it was not just Justice Breyer's or the government's analysis that lacked real limits, it was the Court's post-New Deal Commerce Clause jurisprudence.²²⁷ Before *Lopez*, most commentators had come to the conclusion that Congress had a free hand in deciding what counts as "commerce among the states."²²⁸ Discontented with that state of affairs but unwilling to take on sixty years of precedent, the Court declared that there are limits because there must be limits, invented its commercial/noncommercial distinction, and struck down the statute.

Much like *National League of Cities* and *New York*, the *Lopez* majority responded to its evident frustration over the expansion of national power by imposing a limit on that power without a great deal of support in constitutional text, history, or precedent. Also like those cases, *Lopez* made no real effort to link its doctrinal innovation to any of federalism's pragmatic values. Justice Rehnquist did quote *Ashcroft* to the effect that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."²²⁹ He did not, however, make any explicit connection between the commercial/noncommercial distinction and either maintaining a healthy balance of power or reducing the risk of tyranny and abuse.

Lopez, again like *National League of Cities*, evoked strong reaction from commentators, with several describing it as revolutionary.²³⁰ Because it limits the commerce power gener-

225. *Id.*

226. *Id.* at 564.

227. To be sure, as Chief Justice Rehnquist's opinion carefully pointed out, each of the significant decisions beginning with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), included language suggesting that congressional power is not unlimited and that the Court would intervene in an appropriate case. See *Lopez*, 514 U.S. at 556-58.

228. See, e.g., Van Alstyne, *supra* note 9, at 1722.

229. 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

230. See, e.g., Calabresi, *supra* note 2, at 752 (describing *Lopez* as a "revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers"); Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, at A1 (stating that "it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of rein-

ally, rather than congressional authority to regulate states, *Lopez* does have greater revolutionary potential than either *National League of Cities* or *New York and Printz*. But Judge Louis Pollak was probably right when he observed that "there is less in *Lopez* than meets the eye."²³¹ The majority opinion was quite careful not to upset modern Commerce Clause cases, and two of its five members suggested that *Lopez* itself was a close case.²³² Only Justice Thomas revealed himself as a real revolutionary by calling for a fundamental reexamination of post-New Deal Commerce Clause precedent.²³³ In the end, while the commercial/noncommercial distinction has potential significance, the Court's reaffirmance of cases like *Wickard v. Filburn* and *Katzenbach v. McClung* suggests that as a practical matter congressional power is not much diminished. Perhaps the best description of *Lopez*'s significance is as one in a series of periodic reminders to Congress that its powers are not plenary and that the Court is paying attention.²³⁴

stalling the Articles of Confederation" and that "[i]t is hard to overstate the importance of how close they came to something radically different from the modern understanding of the Constitution") (quoting Professor Laurence H. Tribe); Timothy M. Phelps, *Judicial Revolution: Recent Cases Reveal Slant Toward States*, *NEWSDAY*, May 29, 1995, at A13 (discussing *Lopez* as evidence of a "revolutionary states-rights movement within the court"); cf. Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 *CASE W. RES. L. REV.* 845, 869-75 (1995) (suggesting that *Lopez* may be part of a significant governmental transformation).

231. Louis H. Pollak, *Foreword to Symposium: Reflections on United States v. Lopez*, 94 *MICH. L. REV.* 533, 553 (1995); see also Robert F. Nagel, *The Future of Federalism*, 46 *CASE W. RES. L. REV.* 643, 661 (1996) (arguing that those who see *Lopez* as harbinger of great change "are looking for the future in the wrong place").

232. See *Lopez*, 514 U.S. at 568, 583 (Kennedy, J., joined by O'Connor, J., concurring).

233. See *id.* at 596-601 (Thomas, J., concurring).

234. Cf. PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 192-94 (1982) (so describing earlier judicial assertions of power to strike down national legislation in the name of federalism). The Court has been busy with such federalism reminders in contexts other than the Commerce Clause and the Tenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting the scope of Congress's enforcement powers under section 5 of the Fourteenth Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacks authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity).

E. THE CONTINUING ALLURE OF A JUDICIALLY ENFORCEABLE FEDERALISM

Why has the Supreme Court again sought a significant role in protecting states from the exercise of national power? What is the continuing allure of a judicially enforced federalism? There is rhetoric in some of the Court's recent opinions suggesting that an unchecked Congress might effectively obliterate the states, either by taking over the states' responsibility for the day-to-day business of governing or by reducing the states to mere field offices of the national government.²³⁵ As Justice O'Connor put it dissenting in *Garcia*, "[w]ith the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."²³⁶ But of course there is no real reason to fear that Congress will destroy the states, literally or figuratively.²³⁷ Certainly the statutes at issue in *National League of Cities*, *Ashcroft*, *New York*, *Lopez* and *Printz*, examined alone or collectively, present no such threat. Even after more than sixty years of dramatic (though perhaps now interrupted) expansion of the national government, "[t]he law that most affects most people in their daily lives is still overwhelmingly state law."²³⁸ The states

235. See, e.g., *Lopez*, 514 U.S. at 564 (warning that the government's justification of the Gun Free School Zones Act would justify an unlimited, "general federal police power," "even in areas such as criminal law enforcement or education where States historically have been sovereign"); *New York v. United States*, 505 U.S. 144, 162 (1992) (stressing importance of "the preservation of the States, and the maintenance of their governments") (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)); *id.* at 163 ("[N]either government may destroy the other") (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926)); *id.* at 188 ("States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government."); cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935) (describing the distinction between "direct" and "indirect" effects on commerce as "a fundamental one, essential to the maintenance of our constitutional system," because without it "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government").

236. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

237. See Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1313-14 (1997) (describing as "spurious" the "idea that if Congress had all the power it needed to govern the nation for the nation's general welfare, the states would cease to exist as states, and we would have a single consolidated country"); *id.* at 1295 ("Congress clearly is not going to dismantle the states.").

238. *Kramer*, *supra* note 9, at 1504; see also H. Geoffrey Moulton, Jr., *Fed-*

aren't going anywhere. Why, then, is the Court working so hard to protect them?

Reading between the lines of the Court's recent opinions suggests that the "re-renewed" interest in a judicial role stems from frustration over the contrast between the framers' vision of the national government and the late twentieth century reality. Despite the Court's rhetoric, its interest may be not so much protecting the states as checking the expansion of national power, whether or not that expansion is at state expense. As Justice O'Connor observed in *New York*, "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers."²³⁹ The Court has allowed it to do so in part because "the Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power,"²⁴⁰ in part because, as Justice O'Connor charitably remarked, "[t]he Court's jurisprudence in this area has traveled an unsteady path,"²⁴¹ and in part because the Civil War amendments fundamentally altered the federal-state balance.²⁴² The Court's frustration is understandable, given that the framers contemplated a limited national government and judicial review, while today's national government is not terribly limited²⁴³ and after two hundred years the Court still has not developed a method of review that imposes effective limits.

Viewed from the end of the twentieth century, the Court's failure to effectively limit national power seems almost inevi-

eralism and Choice of Law in the Regulation of Legal Ethics, 82 MINN. L. REV. 73, 126 (1997) (noting that despite dramatic changes following the Civil War and the New Deal, "[f]ederal law remains . . . 'generally interstitial in its nature'") (quoting PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533-34 (3d ed. 1988)).

239. 505 U.S. at 157.

240. *Id.* at 159 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

241. *Id.* at 160.

242. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 81 (1991).

243. While this observation is undoubtedly correct, it should not be overstated. Not only do states still do most of the governing in this country, but the dramatic increase in scope of the national government during this century has tracked a similar increase in the scope of state government. Cf. Weinberg, *supra* note 237, at 1316 ("[W]ith the passing of the *Lochner* era and the reign of *Swift v. Tyson*, the states obviously had more power than they had before the constitutional revolution of 1937.") (footnotes omitted); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 4 (3d ed. 1998) ("While total federal employment has stabilized at about three million, state and local employment has climbed from three million in 1945 to eleven million in 1982.").

table. The framers' chosen mechanism was to enumerate the national government's powers, leaving all other governmental authority to the states. But the enumerated powers granted, in light of revolutionary changes in the national economy, have turned out to be broad enough to allow congressional control over almost any imaginable activity. While it is commonplace to note the effects of sweeping technological changes on the nature of government, the framers' absolute (and entirely understandable) failure to imagine anything like those changes bears brief emphasis. Writing of the administration of Thomas Jefferson, Stephen Ambrose described as a "critical fact in the world of 1801" that

nothing moved faster than the speed of a horse. No human being, no manufactured item, no bushel of wheat, no side of beef (or any beef on the hoof for that matter), no letter, no information, no idea, order, or instruction. . . . Nothing ever had moved any faster, and, as far as Jefferson's contemporaries were able to tell, nothing ever would.

And except on a racetrack, no horse moved very fast. . . . The best highway in the country ran from Boston to New York; it took a light stagecoach, carrying only passengers, their baggage and the mail, changing horses at every way station, three full days to make the 175-mile journey. The hundred miles from New York to Philadelphia took two days. . . . To move men or mail from the Mississippi River to the Atlantic Seaboard took six weeks or more; anything heavier than a letter took two months.²⁴⁴

Perhaps more important, "[p]eople took it for granted that things would always be this way."²⁴⁵ No significant advances in the transportation of people, goods, or information had been realized since the time of ancient Greece.²⁴⁶ It is not surprising, therefore, that the framers did not anticipate any fundamental changes in interstate commerce during the life of the Constitution. As Henry Adams wrote of the early nineteenth century view of commerce and technology, "[e]xperience forced on men's minds the conviction that what had ever been must ever be."²⁴⁷

The problem of enumerated powers becoming limitless was foreshadowed as early as *Gibbons v. Ogden*.²⁴⁸ There the Court addressed state regulation of steamboats, a mode of transportation barely imagined when the Constitution was ratified just

244. STEPHEN E. AMBROSE, *UNDAUNTED COURAGE* 52 (1996).

245. *Id.*

246. *See id.* at 53.

247. HENRY ADAMS, *HISTORY OF THE UNITED STATES DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON* 52 (Library of America ed., 1986).

248. 22 U.S. (9 Wheat.) 1 (1824).

thirty-five years earlier. Chief Justice Marshall's description of congressional power in the field of interstate commerce as "plenary"²⁴⁹ thus carried with it implications unanticipated by the framers. Moreover, Marshall also suggested that the Court would have little role in cabinining national authority.²⁵⁰ In the 175 years since *Gibbons*, with occasional exceptions, the enumerated-powers limit on national authority has not been particularly limiting.

Chief Justice Rehnquist in *Lopez* offered the following specter: If Congress has the power to regulate guns in schools because they

adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning" . . . and that, in turn, has a substantial effect on interstate commerce.²⁵¹

Exactly right. *Lopez* aside, post-1937 Commerce Clause precedents, coupled with the integration of the national economy, would comfortably support direct congressional regulation of education.²⁵² Unable to cope with that reality, the Court in *Lopez* sought to protect education from national encroachment by creating a new category of "noncommercial" activity and placing that activity beyond national control.

* * *

The Court's doctrinal innovations in *National League of Cities*, *Ashcroft*, *New York*, *Lopez* and *Printz* might best be understood as reactions to the Court's perception that the federal-state balance has gotten out of whack and that Congress cannot be trusted to put things right. The Court's statement in *Ashcroft* that "[t]he Federal Government holds a decided ad-

249. *Id.* at 197.

250. *See id.* ("The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse.")

251. *United States v. Lopez*, 514 U.S. 549, 565 (1995) (citation to Justice Breyer's dissenting opinion omitted).

252. Of course the existence of authority does not render wise its exercise. There may be many good reasons to oppose significant national control of education. Many of those reasons are federalism-related, including the numerous advantages of local delivery of educational services.

vantage in this delicate balance [between state and national power]"²⁵³ reads as much like lament as observation. This renewed interest in a significant judicial role, as Yogi Berra might have said, is "déjà vu all over again."²⁵⁴ The Court's last sustained effort to impose serious limits on the national government came in cases like *Hammer v. Dagenhart*, *Schechter Poultry*, and *Carter Coal*.²⁵⁵ Those cases revealed the very serious risk that an effort to put the brakes on national expansion might deny Congress a power truly needed to address problems unimagined in 1789. In *New York*, Justice O'Connor counseled vigilance against "our own best intentions" lest the Court succumb to the temptation to uphold national legislation that is merely "the product of the era's perceived necessity."²⁵⁶ But the more dangerous "perceived necessity" may be a vigorous judicial limitation of national power in the name of federalism, particularly one supported more by nostalgia than by constitutional text or history.

III. FOR AND AGAINST A JUDICIALLY ENFORCEABLE FEDERALISM

The Supreme Court has not yet found adequate doctrinal tools to promote federalism values without simultaneously obstructing needed national legislation. There is little reason to believe that the Court's most recent steps down the "unsteady path" of judicially enforced federalism will be any more effective than those taken earlier. These steps are both unsupported by constitutional text, structure or history and unrelated to the purported virtues of federalism. Even on their own terms they are unlikely to have much impact on the scope of the national government or the autonomy of the states. The no-commandeering rule leaves the national government free to secure state implementation of national policy through the time-tested devices of conditional spending and preemption.

253. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

254. PAUL DICKSON, *BASEBALL'S GREATEST QUOTATIONS* 44 (1991). While some version of this statement is frequently attributed to Berra, see, e.g., *Claussen v. Aetna Casualty & Surety Co.*, 754 F. Supp. 1576, 1577 (S.D. Ga. 1990), Berra denies having said it. See YOGI BERRA WITH TIM HORTON, *YOGI: IT AIN'T OVER* 20 (1997).

255. See *supra* notes 15-22 and accompanying text.

256. *New York v. United States*, 505 U.S. 144, 187 (1992). One might reasonably think that responding to "the era's perceived necessity" is precisely what legislatures are supposed to do.

The clear statement rule, at least for future legislation, simply requires greater care in drafting. Even *Lopez*, while it may contain the seeds of significant change, is unlikely to grow into more than a minor obstacle to a nearly omni-competent Congress.

What, then, is the appropriate judicial role with respect to federalism? One possibility, advanced by Professors Wechsler and Choper and temporarily adopted by the Court in *Garcia*, is for the Court to stay out altogether. A second option, suggested by Professor Richard Epstein²⁵⁷ and urged by Justice Thomas,²⁵⁸ is a radical revision of the Court's Commerce Clause jurisprudence such that the national government would be returned to its pre-New Deal size and scope. A third option, advanced recently, is fashioning doctrine through which the Court could enforce federalism's insights about the most effective allocation of decisionmaking responsibility.²⁵⁹ This Part examines these options, as well as the Court's current doctrine, in light of both the framers' conception of the judicial role and a pragmatic assessment of each option's likely consequences.

A. THE CONSTITUTION AND THE JUDICIAL SAFEGUARDS OF FEDERALISM

In his opinion for the Court in *Garcia*, Justice Blackmun argued against the judicial safeguarding of federalism on the ground that the "principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."²⁶⁰ Citing Wechsler, Choper and Bruce La Pierre,²⁶¹ he briefly described the institu-

257. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1454-55 (1987).

258. See *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

259. See, e.g., Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 823 (1996) (arguing for a reconstruction of Commerce Clause jurisprudence that would "take[] into account the positive value of state and local government, the best uses of federal power, and the ideal allocation of cases between the state and federal courts"); Regan, *supra* note 211, at 555-59 (suggesting that exercise of federal authority ought to be upheld only upon demonstration of genuine national interest or state incompetence).

260. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

261. See *id.* at 551 n.11 (citing CHOPER, *supra* note 7; Wechsler, *supra* note 6; La Pierre, *supra* note 59).

tional arrangements "designed in large part to protect the States from overreaching by Congress".²⁶²

The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent.²⁶³

That these arrangements today provide scant protection for state interests is largely beyond dispute.²⁶⁴ Moreover, contrary to the suggestions of both *Garcia* and Professor Wechsler, there is little support for the proposition that the framers intended the extent of national power to be effectively nonjusticiable.

Justice Blackmun described his functional claim that judicial review was unnecessary to protect state interests as also "evident in the view of the Framers."²⁶⁵ Professor Wechsler likewise referenced the framers' intent, contending that "[t]he prime function envisaged for judicial review—in relation to federalism—was the maintenance of national supremacy against nullification or usurpation by the individual states," not the protection of states from national usurpation.²⁶⁶ But while the framers undoubtedly believed that state interests would find voice in the national political process, and indeed that states would rely on self-help should that process fail,²⁶⁷

262. 469 U.S. at 550-51.

263. *Id.* at 551 (citations to Constitution omitted).

264. See *infra* Part III.B.2.

265. 469 U.S. at 551.

266. Wechsler, *supra* note 6, at 559. Professor Choper, who unlike Wechsler openly advocated the nonjusticiability of federalism issues, did not seek support for his position in evidence of the framers' intent. He instead argued that such evidence was contradictory and unhelpful. See CHOPER, *supra* note 7, at 242.

267. See THE FEDERALIST NO. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

[T]he State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only be the VOICE, but, if necessary, the ARM of their discontent.

they also viewed judicial review as an important tool for protecting the states from the nation. Other commentators, most notably Professor John Yoo, have marshaled the relevant historical materials and demonstrated that the framers understood the Constitution to permit judicial review of the scope of congressional power.²⁶⁸ For present purposes, it is enough to note that Hamilton's famous discussion of judicial review in *The Federalist No. 78* was a response to the anti-federalist charge that the Constitution left Congress as the only judge of its own power.²⁶⁹ Indeed, the critical paragraph in *No. 78* begins by rejecting this very claim:

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution.²⁷⁰

So when Hamilton described "ascertain[ing the Constitution's] meaning" as "the proper and peculiar province of the courts,"²⁷¹ he was referring specifically to judicial review in cases challenging the scope of congressional authority.²⁷² Even if the

Larry Kramer describes this argument as control through "outside agitation," Kramer, *supra* note 9, at 1515, and fairly characterizes the framers' belief that it would effectively thwart federal ambition as hopelessly naive, *see id.* at 1515-18.

268. *See* Yoo, *supra* note 2, at 1357-91.

269. *See Brutus V*, N.Y.J., Dec. 13, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION 500 (Bernard Bailyn ed., 1993) ("[I]t is obvious, that the legislature alone must judge what laws are proper and necessary for the purpose."); *Brutus VI*, N.Y.J., Dec. 27, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra*, at 618 ("It will then be a matter of [public] opinion, what tends to the general welfare; and the Congress will be the only judges in the matter.").

270. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

271. *Id.*

272. *See* Yoo, *supra* note 2, at 1385-87. James Wilson, in his speech before the Pennsylvania ratifying convention, made one of the most direct statements demonstrating that judicial review of federalism issues was part of the original constitutional design. Wilson described judicial review, not the national political process, as the ultimate protection against national overreaching.

[U]nder this constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. . . . I had occasion, on a former day, to state that the power of the constitution was paramount to the power of the legislature, acting under that constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that

framers put great stock in nonjudicial mechanisms for protecting state interests, they plainly did not view those mechanisms as exclusive. Asking whether Congress has a rational basis for legislating under the Commerce Clause, as the Court purported to do in *Lopez*, is thus consistent with the framers' vision. Treating federalism claims as nonjusticiable, as the Court arguably did in *Garcia*, is not.

While the relevant history shows that the framers intended a judicial role, it reveals little about the contemplated nature of that role. As discussed above, neither of the Court's recent doctrinal innovations—the no-commandeering rule and the commercial/noncommercial distinction—was contemplated by the framers.²⁷³ Nor have the proponents of judicial review been able to support their particular doctrinal preferences with evidence of the framers' intent. For example, Professor Yoo's exhaustive review and analysis of the historical materials establishes only that judicial review was contemplated; it offers no account of what the framers thought that review would look like.²⁷⁴ That the framers failed to spell out just how courts might check congressional excesses is not terribly surprising, given that the Constitution's federal structure was pure experiment. While the framers spilled much ink on the subject of federalism, and while it is often described as their major contribution to political theory,²⁷⁵ they "really had no idea how a functioning federalism would work."²⁷⁶ Now, more than two hundred years later, we have a better sense of the ways in which federalism works but little more sense of the appropriate judicial role.

transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void

James Wilson, Remarks at Pennsylvania Ratifying Convention (Dec. 1, 1787), reprinted in 1 *DEBATE ON THE CONSTITUTION*, *supra* note 269, at 822-23; see also *THE FEDERALIST* NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) ("[I]n controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government.").

273. See *supra* Part II.C-D.

274. See Yoo, *supra* note 2, at 1314 n.10.

275. See, e.g., *Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery.").

276. Kramer, *supra* note 9, at 1517; see also GEORGE W. CAREY, *THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC* 96-125 (1989) (describing the failure of *The Federalist* to offer a coherent explanation of federalism).

B. PRAGMATIC JUSTIFICATIONS: JUDICIAL REVIEW AND THE INTELLECTUAL CASE FOR FEDERALISM

American federalism was a pragmatic invention, a compromise designed to leave the states with primary responsibility for governing while granting the national government sufficient power to handle those aspects of government beyond the states' institutional competence. The contemporary intellectual debate is likewise pragmatic, with federalism's proponents trumpeting its instrumental values while opponents describe its pernicious consequences.²⁷⁷ The Supreme Court has never fully entered this debate, taking instead a formalist approach to federalism issues. The closest it has come to contributing was in *Gregory v. Ashcroft*, which purported to catalog the "numerous advantages" of the "federalist structure of joint sovereigns":

[1] It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; [2] it increases opportunity for citizen involvement in democratic processes; [3] it allows for more innovation and experimentation in government; and [4] it makes [the] government more responsive by putting the States in competition for a mobile citizenry. . . . [5] Perhaps the principal benefit of the federalist system is a check on the abuses of government power.²⁷⁸

This paean to state government, while a welcome recognition by the Court of federalism's fundamentally pragmatic character, paints just half the picture. The other half, left unsketched by the Court, includes the recognition that sometimes national regulation is desirable or even essential,²⁷⁹ a recognition so fundamental that it led to the replacement of the Articles of Confederation and the framing of the Constitution.

The benefits claimed for state regulation divide roughly into two categories, those that relate to normative diversity among states and those that relate to reserving power for the states as opposed to the national government. In each category, the conditions that foster practical benefits also harbor the potential for serious harm that can best be remedied through national intervention.

277. See Moulton, *supra* note 238, at 105-07 (cataloging claimed virtues of federalism and critics' responses).

278. 501 U.S. 452, 458 (1991) (bracketed numerals added).

279. See Kramer, *supra* note 9, at 1502 ("There are, after all, two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable.").

The diversity-related benefits of federalism all flow from the fact that normative variation is the inevitable product of a system in which the states retain primary responsibility for making law.²⁸⁰ The diversity of policies produced by state-level decisionmaking, coupled with citizen mobility, permits a far greater level of citizen satisfaction than could a single, central government.²⁸¹ This insight, which was appreciated by the founding generation²⁸² and which has been developed by modern public choice and positive political theory,²⁸³ retains great

280. Federalism's diversity-related benefits (and limits) are further elaborated in Moulton, *supra* note 238, at 125-42.

281. That federalism enhances individual preference satisfaction is captured in the following model:

Assume that there are two states, A and B, with equal populations of 100 each. Assume further that eighty percent of the people in State A wish to permit contingent-fee arrangements in criminal cases, while only thirty percent of the people in State B wish to permit such arrangements. If the decision is made by the national government based on the preference of the majority, 110 people will be pleased, and ninety will be displeased. But if separate decisions are made by the majorities in each state, 150 people will be pleased, and just fifty will be displeased.

Id. at 127. For similar models, see Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19, 22 (1969), and McConnell, *supra* note 94, at 1494.

Adding the mobility of citizens (and capital) to state-level decisionmaking furthers the preference-maximizing quality of federalism. In addition to voting rights, citizens have "exit rights" as a means of expressing their policy preferences. See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 106-19 (1970); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1237 (1994); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992). In the model above, for example, 20 citizens of State A and thirty citizens of State B were dissatisfied with the policy choices of their respective states. If some of those citizens were to vote again, this time with their feet, individual preference satisfaction would be further enhanced.

282. See, e.g., *Letters from the Federal Farmer*, in 2 THE COMPLETE ANTI-FEDERALIST 230 (Herbert J. Storing ed., 1981) ("[O]ne government and general legislation alone, never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded."); *Essays by the Impartial Examiner*, in THE COMPLETE ANTI-FEDERALIST, *supra*, at 180 ("For being different societies, though blended together in legislation, and having as different interests; no uniform rule for the whole seems to be practicable.").

283. See, e.g., WALLACE E. OATES, *FISCAL FEDERALISM* 11-13 (1972); VINCENT OSTRUM, *THE MEANING OF AMERICAN FEDERALISM* 126-32 (1991); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467-70 (1995); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956); Tullock, *supra* note 281, at 21. On the

force today. Despite the undeniable homogenization of American culture, substantial social science research demonstrates that states and regions retain distinctive cultures and attitudes, and that government policies have a measurable effect on migration patterns.²⁸⁴

Federalism's complement to citizen choice is the creation of a market for government services, which in turn promotes competition and innovation. Unlike a unitary central government, which is relatively unaffected by competition,²⁸⁵ state governments have an incentive to develop and implement policies designed to attract mobile taxpayers and capital.²⁸⁶ While of relatively recent vintage,²⁸⁷ the argument that federalism promotes interstate competition and innovation is largely unassailable.²⁸⁸

distinctions, if any, between public choice theory and positive political theory, see Daniel A. Farber & Philip P. Frickey, *Foreword to Symposium: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 458-63 (1992).

284. See Moulton, *supra* note 238, at 129-31 (discussing relevant research); see also DANIEL J. ELAZAR, *THE AMERICAN MOSAIC: THE IMPACT OF SPACE, TIME, AND CULTURE ON AMERICAN POLITICS* (1994) (detailing and categorizing American regional diversity).

285. See McConnell, *supra* note 94, at 1498 ("A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goad of competition."); THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* 14-15 (1990) ("[C]ompetition among governments, offering different types and levels of public goods at different costs, provides a rough market solution to the information problems confronting public officials.").

286. Michael McConnell expresses the point as follows:

If a community can attract additional taxpayers, each citizen's share of the overhead costs of government is proportionately reduced. Since people are better able to move among states or communities than to emigrate from the United States, competition among governments for taxpayers will be far stronger at the state and local level than at the federal level. Since most people are taxpayers, this means that there is a powerful incentive for decentralized governments to make things better for most people.

McConnell, *supra* note 94, at 1498-99.

287. Justice Brandeis described states as experimental laboratories in 1932. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). That the framers did not tout interstate competition as one of the benefits of federalism is hardly surprising, given that such competition stems in large part from a ready mobility that was unknown and unanticipated at the end of the 18th century.

288. Edwin Rubin and Malcolm Feeley have argued that this and most of the other claimed benefits of federalism could be achieved as well through de-

What the Supreme Court has tended to ignore about the diversity-related consequences of federalism is that they are not all good. While decentralized decisionmaking promotes individual preference satisfaction, it sometimes leads to pernicious norms that are unacceptable to the polity as a whole,²⁸⁹ or to a diversity of norms that creates unacceptable costs.²⁹⁰ While the effort to attract citizens and capital forces governments to be responsive to market pressures, sometimes those same pressures prevent the production of needed public goods, create externalities that individual states cannot contain, or promote destructive competition.²⁹¹ In all those cases, the economics and political science of federalism demand a national solution. As Hamilton said in reference to interstate commerce, "[t]he interfering and unneighborly regulations of some States" must be "restrained by a national control."²⁹²

centralization directed by a wise central authority. See Edwin L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). While their arguments have significant force, the political independence of state and local officials requires a level of decentralization that a central authority would be otherwise free to ignore.

Susan Rose-Ackerman has argued that local politicians in a federal system are more risk-averse than politicians in a unitary national government, and that federalism therefore impedes innovation. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980). The difficulty with this claim is that, even assuming state politicians are more risk-averse than national politicians, "there will be more innovation in a decentralized system *as a whole*, because there are more actors and because individual constituencies will perceive risk and reward differently." McConnell, *supra* note 94, at 1498 n.58; see also DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 85-86 (1995).

289. See SHAPIRO, *supra* note 288, at 55-56.

290. Richard Briffault put the latter point as follows:

The value of state diversity . . . will frequently clash with the value of national uniformity. This has implications for both the economy and for our definitions of the rights of American citizens. In a mobile society and an increasingly integrated national economy, people, goods, services, and capital constantly are crossing state borders. Multiple and divergent state laws drive up the cost of doing business and the costs consumers pay for goods and services. Indeed, the existence of multiple law-making bodies may make it difficult for people and businesses to know what laws they are subject to and whether their conduct violates a particular state's rule.

Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1320 (1994).

291. See Moulton, *supra* note 238, at 136-41.

292. THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), provides an early example of "unneighborly" state regulation.

Justice O'Connor in *Ashcroft* described the other category of federalism's virtues as protecting "our fundamental liberties."²⁹³ She explained that like the separation of powers between the branches of government, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."²⁹⁴ Federalism's track record as liberty enhancer, however, has been mixed at best. Critics have rightly pointed out that states, left to their own devices, have been more threat than protection for individual and group rights.²⁹⁵ Slavery, followed by persistent, state-sponsored race discrimination, tops a list of federalism's threats to individual liberty that includes examples in the areas of free speech and freedom of religion, criminal procedure, reproductive rights and civil rights.²⁹⁶ National intervention has been and will continue to be necessary where states make choices that the national polity deems fundamentally unjust.²⁹⁷ Protecting states from national intervention, in other words, is an unreliable tool for protecting liberty. If restraining the national government prevents tyranny, it does so based on the

293. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citations omitted).

294. *Id.*

295. See, e.g., SHAPIRO, *supra* note 288, at 52-55; WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 142, 145 (1964); Gary Jeffrey Jacobsohn, *Contemporary Constitutional Theory, Federalism, and the Protection of Rights*, in *FEDERALISM AND RIGHTS* 29, 43 (Ellis Katz & G. Alan Tarr eds., 1996) ("Where rights are involved, local communities have become the problem, not the solution.").

296. See Moulton, *supra* note 238, at 135 (providing examples). Any meaningful discussion of the Constitution's allocation of authority between states and nation must include reference to the impact of the Reconstruction Amendments. Conventional wisdom holds that Reconstruction worked "profound alterations in nation-state relationships." HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 467 (1973); see also JACOBUS TENBROEK, *EQUAL UNDER LAW* 239 (1965) (Fourteenth Amendment effected "a revolution in federalism"). Like much conventional wisdom, this observation is largely accurate. By nationalizing civil rights, and giving Congress enforcement power, the Reconstruction Amendments dramatically expanded the authority, and the potential role, of the national government. The significance of Reconstruction for federalism can be overstated, however. One might reasonably view the Thirteenth, Fourteenth and Fifteenth Amendments more as relatively narrow attempts to address particular (though particularly horrible) problems than as a considered effort to alter fundamentally the relative roles of states and nation across the range of government responsibility. It does not do, in other words, to respond to federalism claims by asserting that the Civil War changed all that.

297. See SHAPIRO, *supra* note 288, at 55-56.

principle of limited government, not federalism.²⁹⁸ If federalism promotes liberty, it does so by promoting citizen choice, not by setting state against federal power.

Federalism's great contribution to the science of government is not the value of a limited national government, but rather the insight that dividing responsibilities among different levels of government permits the nation to reap the benefits of both normative diversity and, where appropriate, national uniformity. While the framers may not have comprehended the full scope of this contribution, modern economic theory and political science recognize that different levels of government have comparative advantages and disadvantages in the delivery of services.²⁹⁹ For example, state and local governments are generally better suited than the national government to design, implement and fund "developmental programs"—those programs that "provide the physical and social infrastructure necessary to facilitate a country's economic growth."³⁰⁰ When local, and to a lesser degree state, governments design and deliver roads, police and fire protection, sanitation services and educational programs, they are disciplined by market forces in a way that the national government is not. Dissatisfaction with local public services tends to drive people and business away,³⁰¹ which in turn can drive public officials out of office. As noted above, this competitive federalism both fosters innovation and promotes citizen choice. Because the barriers to moving out of the country are much greater than the barriers to local and interstate migration, the national government gets far less market-based feedback about its policies, and hence is less likely to be sensitive to the needs and desires of citizens and capital.

298. See *infra* note 313 and accompanying text.

299. See generally PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 17-39 (1995) (synthesizing relevant literature and describing relative advantages of federal, state and local government in the delivery of services).

300. *Id.* at 17.

301. This point is limited by the undeniable fact that many citizens are not adequately mobile, informed, or motivated to vote with their feet. See James M. Buchanan & Charles J. Goetz, *Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model*, 1 J. PUB. ECON. 25, 27-34 (1972) (discussing limits of efficiency analysis that assumes all individuals have unlimited mobility). Nevertheless, substantial evidence suggests that government policies have an impact on migration patterns and that even groups once thought geographically immobile, such as welfare recipients, are likely to move in response to state benefit levels. See PETERSON, *supra* note 299, at 30.

Conversely, the mobility that imposes market discipline on state and local governments renders them relatively ill-suited to provide meaningful redistributive programs—those that “reallocate societal resources from the ‘haves’ to the ‘have-nots.’”³⁰² Local or even state-based redistributive programs create incentives for the wealthy to leave and potential recipients to arrive, thus lowering the general welfare of the jurisdiction and undermining the redistributive policy itself.³⁰³ State and local officials, faced with the prospect of such costly migration, are unlikely to undertake substantial redistribution efforts in the first place. One telling illustration of this principle is the fact that state and local governments rarely impose progressive income taxes, recognizing that such taxes might drive out wealthy citizens and hence reduce the tax base.³⁰⁴ So while the national government is relatively ill-equipped to meet most of the country’s developmental needs, “[w]here redistribution is the objective . . . advocates should and do press for federal programs, or at least for minimum federal standards.”³⁰⁵

There are, of course, significant exceptions to these general principles. Some development-related problems, such as those concerning interstate transportation or the control of environmental pollution, may require regional or national attention.³⁰⁶ And local differences in resources inevitably lead to inequities in developmental spending that can be addressed only at some higher level of government.³⁰⁷ Similarly, some states have suf-

302. PETERSON, *supra* note 299, at 17.

303. See SHAPIRO, *supra* note 288, at 46; William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1364 (1994). The Supreme Court, by ruling that state newcomers must be given equal access to government services, *Shapiro v. Thompson*, 394 U.S. 618 (1969), substantially reduced the cost of moving to get access to more generous programs.

304. See PETERSON, *supra* note 299, at 19-20.

305. McConnell, *supra* note 94, at 1500 (footnote omitted).

306. See, e.g., PETERSON, *supra* note 299, at 25 (“Any program of pollution control will necessarily impose costs on particular neighborhoods and communities. If such decisions are left to local government, each will insist that the problem must be addressed but the solution should be located somewhere else.”).

307. One inevitable consequence of local control of developmental services is disparity in the quality and extent of such services. When such disparity simply reflects the preferences of local citizens, it is a beneficent product of the federal system. But when such disparity is rather the product of disparities in fiscal capacity, it is arguably unfair and potentially destructive. So when wealthier communities “choose” to spend more on education than do poorer communities, for example, some sort of equalizing intervention by a

ficient territorial reach that for many citizens the costs of moving in or out preclude moving just to enjoy the benefits of (or to escape the costs of) generous redistribution programs.³⁰⁸ Moreover, not all government programs fit neatly into developmental or redistributive boxes, making wise allocation of responsibility more difficult and contestable. In short, despite the existence of general principles that might guide decisions concerning the allocation of responsibility among levels of government, there remains room for substantial, reasoned disagreement about the most effective implementation of any given program or policy.

For judicially enforced federalism doctrine to be instrumentally valuable, it would have to promote decisionmaking that recognizes federalism's advantages. Given how much we do not know about those advantages, however, particularly about the wise distribution of authority among levels of government, court-enforced federalism doctrine should not determine too many policy choices. Current Supreme Court doctrine does little to promote federalism's virtues and indeed may cause them some harm.

1. Current Doctrine and the Virtues of Federalism

As the foregoing discussion suggests, there are many areas in which state-level norm-setting holds significant advantages over national norm-setting. If federalism doctrine could be shaped to protect state decisions from national encroachment in those areas, while simultaneously permitting national intervention where appropriate, then judicial enforcement of federalism would have real instrumental value.³⁰⁹ Current federalism doctrine, however, makes no such effort, instead seeking to limit national power without regard to the relative competencies of different levels of government.

a. *The No-Commandeering Rule*

The Court has defended the no-commandeering rule not on instrumental grounds but rather by weak reference to constitutional structure and history.³¹⁰ As it turns out, no federalism-

higher level of government may be warranted.

308. See PETERSON, *supra* note 299, at 28.

309. That is not to say that federalism doctrine so fashioned would be legitimate, only that unlike current doctrine it would promote federalism's values.

310. See *supra* Part II.C.

based instrumental defense is possible. In terms of the diversity-related virtues of federalism, the rule does no good and threatens some harm. First, because it is not limited to those subject areas best suited to state control, the prohibition on commandeering could be used to prohibit the sort of national intervention that federalism demands. Second, the rule fails to prevent, and indeed may encourage, the most intrusive sort of national intervention—complete preemption—which in turn leaves no room for state-driven normative variation. In *New York*, for example, the Court left the national government free to preempt state regulation of the disposal of low-level radioactive waste, while invalidating a system that promoted the cooperative exercise of state-level discretion.³¹¹

In terms of preventing tyranny or promoting liberty, the no-commandeering rule is beneficial only in the same way as any other legal limit on government authority. The more carefully and clearly circumscribed the authority of a government, the less likely that government is “to overcome the internal and external factors constraining its power to the point where its edicts are sufficiently extensive to impair significantly the enjoyment of individual liberty.”³¹² This link to liberty, however, comes not from federalism or the promotion of state sovereignty but from the more general concept of limited government.³¹³ Indeed, if limits on the federal government are designed to unleash state governments, then those limits might threaten rather than promote liberty.

The sole practical benefit claimed for the no-commandeering rule in *Printz* and *New York* is that it promotes state autonomy

311. *New York v. United States*, 505 U.S. 144, 166-69 (1992).

312. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1075 (1995) (footnote omitted).

313. See Briffault, *supra* note 290, at 1323:

The argument that federalism is necessary to secure freedom is, perhaps, a confusion of federalism with constitutionalism, that is, government that is subject to fundamental constraints. Federalism may serve to restrict government tyranny in polities which generally impose constitutional constraints—whether of a written or of an unwritten form—on their governments. But in that case, it is the constitutionalism, not federalism, that is doing the work of protecting freedom. Nations may be constitutionally federal but politically tyrannical, much as nations committed to constitutionalism are more likely to be free even if they lack a federal structure. The critical variable is constitutionalism, including the acceptance of limits on government power and protection of the legitimacy of political opposition, not federalism.

or "sovereignty."³¹⁴ At the conclusion of her opinion in *New York*, Justice O'Connor observed that "states are not mere political subdivisions of the United States."³¹⁵ While the import of this observation is not clear, she may have been suggesting that by placing states in a subservient position, national legislation that commands state implementation unacceptably damages states by denying them the freedom to make their own policy choices. But because almost any piece of national legislation limits states' ability to set norms, that fact alone cannot serve to invalidate national law. Moreover, state implementation of national policy, unlike the obvious (and permissible) alternative of direct and preemptive national legislation, may promote state interests by allowing states to shape their implementation to accommodate local needs.³¹⁶ The commandeering condemned by *New York*, for example, left states with considerable discretion concerning central issues such as siting and the nature of interstate cooperation.³¹⁷ A decision by the national government to regulate directly would arguably threaten greater harm to state interests than did the invalidated scheme. In short, the no-commandeering rule does little to promote, and indeed in some cases may undermine, state autonomy.

b. The Commercial Activity Limit on the Commerce Power

The *Lopez* Court made little effort to connect its "commercial activity" limit on Congress's commerce power to any instrumental value of federalism. While it asserted that a "healthy balance of power" helps protect against both state and national tyranny,³¹⁸ it failed to identify any connection between its doctrinal innovation and either the maintenance of a "healthy" balance of power or protection against government tyranny or abuse. That is not to say there is no such connection. To the extent that the commercial/noncommercial distinction restricts the activities subject to regulation by the na-

314. See *supra* Part II.C.

315. 505 U.S. at 188.

316. See Levy, *supra* note 132, at 524 (noting that "[e]xperience with administrative agencies (which occupy the same positions as would states if they implement federal policy) suggests that statutory provisions leave considerable discretion to those charged with their implementation").

317. See *id.* The background check program in *Printz*, by contrast, left the CLEOs with discretion only at the level of administrative detail. See *Printz v. United States*, 521 U.S. 898, 934 (1997).

318. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

tional government, it arguably reduces the areas in which that government can commit abuse. Here again, however, this is simply a less-government-is-better argument. The operative principle is not federalism, which concerns the relative roles of state and national government, but constitutionalism, which holds that all levels of government are subject to fundamental constraints.

The connection between *Lopez*'s commercial activity limit and federalism's insights about the relative advantages of state and national regulation is equally tenuous. The circumstances that warrant national intervention, while ordinarily involving activity that is in some sense "commercial," will often concern "noncommercial" matters. In particular, the fact that the national government is better able than the states to devise redistributive programs is lost in the *Lopez* treatment of noncommercial activity. If states are ill-equipped to maintain such programs, and if the Court means to suggest that the national government is not authorized to create them, then *Lopez*'s doctrinal innovation damages rather than promotes federalism values.

One thing the *Lopez* Court seemed determined to establish was that the national government lacks authority to regulate education directly, presumably because education is not a "commercial" activity.³¹⁹ Yet, as others have suggested, a strong case can be made that education is indeed commercial, given its obvious link to productivity and hence the strength of the national economy.³²⁰ More important, questions concerning the allocation of responsibility for education among national, state, and local governments are far too complex to turn on the relatively empty nomenclature offered by *Lopez*. While there may be reason to be concerned about substantial national involvement in providing education services,³²¹ reducing the issue to a distinction between commercial and noncommercial activity both trivializes the problem and ignores the national-empowerment aspects of federalism.

319. See *id.* at 565 (arguing that the logic of the dissent's argument "would be equally applicable, if not more so, to subjects such as family law and direct regulation of education"). Justice Rehnquist further criticized the dissent for suggesting that "schools fall on the commercial side of the line." *Id.* (quoting *id.* at 629 (Breyer, J., dissenting)).

320. See, e.g., Regan, *supra* note 211, at 579-81.

321. See Weinberg, *supra* note 237, at 1332-34 (arguing that a centralized school curriculum is something to be afraid of).

c. *Ashcroft's Clear Statement Rule*

The clear statement rule of *Gregory v. Ashcroft*³²² does not itself bar Congress from either regulating any particular class of activities or encroaching on areas of traditional state concern. Instead, it requires Congress to state explicitly its intent to regulate core state functions. While the rule is extraordinary in several respects,³²³ particularly in terms of its potential impact on statutes enacted before the rule's announcement, it is linked to federalism's values in an important way. By requiring Congress to acknowledge its intent to legislate in an area traditionally handled by states, the rule builds into the political process an opportunity for Congress to do what it ought to do—consider whether the particular problem at issue is better addressed by national or state (or local) government. Of course creating such an opportunity is no guarantee that Congress will use it wisely, and the rule seems more a sub-constitutional vehicle to restrict congressional action³²⁴ than a genuine effort to promote sensible allocation decisions. Nevertheless, given that the ideal resolution of the federalism problem is to have Congress exercise its supreme authority with due consideration of federalism concerns, *Ashcroft's* clear statement rule does have at least limited instrumental value.

2. Political Safeguards Theory and the Virtues of Federalism

Political safeguards theory holds that the states get all the protection they need from national encroachment through their participation in the national political process. The remarkable weaknesses of this claim as a matter of political science have been well documented by others.³²⁵ The states' power to decide who votes for members of Congress,³²⁶ for example, offers no meaningful control given that almost anything a state could do to protect itself with this power would be "either unlawful or

322. 501 U.S. 452 (1991).

323. See *supra* Part II.B.

324. See Eskridge & Frickey, *supra* note 85, at 623-25.

325. See, e.g., Kramer, *supra* note 9, at 1503-14; DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 185 (3d ed. 1984) (describing the structural protections discussed in text as "the least effective way" for states to influence national policy).

326. See U.S. CONST. art. I, § 2 (stating that voters selecting members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature").

ineffective."³²⁷ The electoral college likewise affords little protection from intrusive national legislation, although it does still affect the course of presidential campaigns.³²⁸ In terms of the Senate, any protection afforded by the Constitution's original scheme of direct representation³²⁹ was eliminated with the passage of the Seventeenth Amendment,³³⁰ and the fact that each state is equally represented simply enhances the relative power of smaller states. As Professor William Van Alstyne bluntly stated, "it is difficult to take the political science portion of the whole 'safeguards' argument as other than a good-hearted joke."³³¹ To put it differently, one suspects that many who oppose judicial enforcement of federalism, contending that federalism values are well protected in the national political process, in fact are convinced that federalism has little relevance in today's economically integrated and culturally homogenized America. States need no protection, one can almost hear them thinking, because states warrant no protection.³³² Whether or not *Garcia* and political safeguards theory act as a cover for closet nationalists, they plainly do little to promote federalism values. The absence of judicial constraints permits the national government to act whether doing so promotes or undermines the virtues of a federal system.

One useful message buried in the political safeguards model is that federalism operates much more pervasively at the level of policy than at the level of power. While the framers contemplated judicial review of federalism issues,³³³ they also expected that the nature of intergovernmental relations would be shaped largely outside the context of litigation.³³⁴ Even *The*

327. Kramer, *supra* note 9, at 1507 (detailing constitutional and legislative limits on states' ability to set voter qualifications).

328. *See id.* at 1508-09.

329. U.S. CONST. art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . .").

330. U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .").

331. Van Alstyne, *supra* note 9, at 1724 n.64.

332. For a thorough and powerful discussion of the contemporary irrelevance of states, see Rubin & Feeley, *supra* note 288.

333. *See supra* Part III.A.

334. *See, e.g.,* Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 85, 89 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988) (noting that the framers left settlement of disputes between states and Congress as much

Federalist "directs our attention to what may be called the political rather than the legal side of federalism."³³⁵ So while federalism issues ought not to be considered nonjusticiable, the political safeguards model rightly focuses attention on the fact that most of the hard work of allocating responsibility among levels of government happens outside the courtroom.

3. Linking Doctrine to the Virtues of Federalism: The Risks of Intrusive Judicial Review

The striking disjunction between current doctrine and federalism values makes it hard to advance the intellectual case for federalism while at the same time defending the Court's recent doctrinal efforts. One option, offered in different forms by several commentators,³³⁶ would be to "begin a reconstruction of Commerce Clause jurisprudence that looks deeply into why it is good for some matters to be governed by a uniform federal standard [and] why it is good for some things to remain under the control of the various states."³³⁷ This is an attractive suggestion, particularly in light of legislators' tendency, explained in part by modern public choice theory, to make allocation decisions based on maximizing their chance for reelection rather than on public-interest-related concerns like the promotion of federalism values.³³⁸ If Congress is unlikely to consider adequately federalism's normative concerns, particularly the benefits of state-level regulation, then perhaps courts should use those concerns as a basis for restricting national action. Upon examination, however, this proposed cure suffers from serious difficulties.

What would federalism doctrine reconstructed to promote federalism values look like? Professor Althouse has suggested

to informal political process as to decisions by Supreme Court); Samuel H. Beer, *The Modernization of American Federalism*, PUBLIUS, Spring 1973, at 49, 51 (federalism influences pattern of intergovernmental relations "[b]oth as a juristic device and as an element of political culture").

335. Martin Diamond, *The Federalist on Federalism: "Neither a National nor a Federal Constitution, but a Composition of Both,"* 86 YALE L.J. 1273, 1283 (1977).

336. See, e.g., Althouse, *supra* note 259; Regan, *supra* note 211.

337. Althouse, *supra* note 259, at 817.

338. See, e.g., DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5-6, 13-17 (1974); Jonathan Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 53 (1988); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212-14 (1976); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3, 3-13 (1971).

that national legislation should be examined to determine whether it addresses (1) "a national market or other system or organization that causes harm at a national level" or (2) harm caused by "moving from state to state."³³⁹ In both classes of cases, she contends, national legislation is warranted because states are less well-suited than the national government to offer solutions.³⁴⁰ In other classes of cases, her federalism doctrine apparently would direct courts to strike down national legislation.³⁴¹ As an example of permissible national regulation in the first category, she offers the regulation of wheat production at issue in *Wickard v. Filburn*,³⁴² explaining that even Filburn's local behavior "was a component in a national problem susceptible only to a national solution."³⁴³ Her example of a harm caused by crossing state lines is the phenomenon of parents moving from state to state to avoid child support obligations, a problem addressed by the Child Support Recovery Act of 1992.³⁴⁴ Some such national legislation is legitimate, she explains, because states acting individually lack the capacity to enforce obligations on parents who have moved to another state. "In contrast, the kind of activity involved in *Lopez* was not only susceptible to local regulation, states had traditionally assumed responsibility in this area and were in all likelihood better suited to handle it."³⁴⁵

Professor Regan urges redefining the commerce power to uphold national action "where and only where there is special justification for it."³⁴⁶ His special justifications look much like Althouse's, although he provides more in the way of elaboration. The national government may legislate either to promote "general interests of the Union" or to address problems as "to which the states are separately incompetent."³⁴⁷ By general interests of the Union he means interests belonging to the nation

339. Althouse, *supra* note 259, at 817.

340. *See id.* at 817-22.

341. Professor Althouse cautions that she is offering not "a definitive structure for Commerce Clause analysis, but . . . the beginning of an exploration into its meaning." *Id.* at 817.

342. 317 U.S. 111 (1942).

343. Althouse, *supra* note 259, at 818.

344. *See id.* at 820.

345. *Id.* at 818.

346. Regan, *supra* note 211, at 555.

347. *Id.* at 570 (quoting NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 298-304, 380 (W.W. Norton & Co. ed., 1966)).

as a whole, such as national security and transportation and communication systems, as opposed to interests that some or all people or states happen to have in common, such as reducing violence in schools.³⁴⁸ By matters as to which the states are separately incompetent, he means problems that cross state lines in ways that render individual state solutions necessarily ineffective. *Wickard v. Filburn* was rightly decided, for example, because in the face of a national market for wheat, an individual state could not effectively boost prices by limiting production.³⁴⁹ Similarly, state-based minimum wage regulation is problematic because of the mobility of goods and capital.³⁵⁰

Both Althouse and Regan suggest that courts assessing the validity of national legislation ask some version of the question, "Is there a good reason to believe that the national government, as opposed to state governments, ought to be addressing this problem?" This approach recognizes that federalism's central question is one of institutional choice, of deciding which level of government is best suited to solve particular problems (or to decide whether something is a problem at all). However, this approach also raises the fundamental institutional-capacity question posed by the judicial enforcement of federalism—is the judiciary the institution best suited to make federalism's allocation decisions?³⁵¹

The difficulty with searching judicial review of legislative decisions allocating government responsibility is that such decisions are often enormously complex and quite contestable, at both the empirical and the normative levels. For example, Regan and Althouse observe that some state regulation has cross-boundary effects that, if serious enough, would warrant national intervention. Judicial disapproval of national intervention would require reviewing, and second-guessing, two congressional judgments: first, the empirical determination that the cross-boundary effects are substantial; and second, the normative judgment that the value of national action therefore outweighs the benefits of state action.³⁵² The empirical deter-

348. See *id.* at 571.

349. See *id.* at 583-86.

350. See *id.* at 586-87.

351. Furthermore, the approach proposed by Professors Althouse and Regan, by demanding special justification for national legislation beyond a connection to interstate commerce, seems to reverse the usual presumption of constitutionality for economic legislation that has prevailed since 1937.

352. See Briffault, *supra* note 290, at 1350.

mination is one better made by legislators with access to a wide range of relevant data than by courts limited to the presentations offered by contestants in lawsuits. More important, the ultimate normative choice between state diversity and national uniformity is the sort of "open-ended and value-laden assessment of the conflicting political values"³⁵³ that our system rightly commits to the political process. Federalism theory recognizes that state-level norm-setting is not always a good thing. While decentralized decisionmaking promotes citizen satisfaction and healthy competition, it also raises the cost of interstate transactions, multiplies externalities, and authorizes local bias. In other words, for every advantage of state-level norm-setting there exists a countervailing reason to favor national regulation, depending on both subtle factual differences and the relative normative weight given to diversity versus uniformity. To grant judges the responsibility for undoing congressional allocation decisions based on federalism values or an alternative view of the facts is to invite the bald substitution of judicial preferences for the judgments of elected officials.³⁵⁴

The current debate over the appropriate allocation of norm-setting and enforcement authority in environmental regulation both illustrates the complexity of the allocation decision and suggests the perils of a significant judicial role. In 1977, Richard Stewart applied the now familiar "race to the bottom" argument for national intervention to the regulation of pollution:

Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards. If each locality reasons in the same way, all will adopt lower standards of environmental quality than they would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards, thus eliminating the threatened loss of industry or development.³⁵⁵

For adherents to this view, the only available "binding mechanism" for avoiding such destructive competition and promoting

353. *Id.* at 1352.

354. *See id.* at 1350.

355. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977) (footnote omitted).

rational collective action is the national government.³⁵⁶ Recently, however, Stewart's analysis has been challenged on the ground that the benefits of a decentralized approach to environmental regulation may outweigh the benefits of national uniformity.³⁵⁷ That challenge has itself generated a flurry of responses,³⁵⁸ and the policy debate has now advanced to the point that sophisticated commentators understand that each environmental issue presents its own unique set of concerns, some of which may be best addressed locally, some nationally, and some internationally.³⁵⁹ For courts to define and enforce a strong preference for regulation at any one level would be to ignore what the executive and legislative branches are much better able to consider—the enormous variety and complexity of environmental problems, and the range of viable responses to those problems.

Serious institutional choice analysis requires a comparison of alternatives, not merely a determination that one alternative has shortcomings.³⁶⁰ One response to the claim that the courts are ill-suited to make federalism's allocation decisions, therefore, is that Congress, at least on occasion, is worse.³⁶¹ Public choice theory holds that participants in the political process act not to further the public interest but only to further their own interest.³⁶² This theory would seem to predict that

356. See, e.g., PAUL E. PETERSON, *CITY LIMITS* 170-71 (1981) (arguing that federal environmental standards are necessary for effective control of industry). In theory, states could avoid the destructive race to the bottom by negotiating in their collective interest. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 17-19 (1960). "But the complexity of most problems of interjurisdictional spillover present insurmountable transaction costs to effective interstate bargaining." Moulton, *supra* note 238, at 141 n.332 (citing authorities).

357. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

358. See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271 (1997); Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997); Peter Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67 (1996).

359. See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1995).

360. See KOMESAR, *supra* note 12, at 5-7.

361. See Althouse, *supra* note 259, at 804.

362. See sources cited *supra* note 338.

the national government, and particularly its elected officials, "will always exercise its power to preempt local law—either to regulate or to forbear from regulating—in order to obtain for itself the political support associated with providing laws to interested political coalitions."³⁶³ Even with the gloss that national legislators will defer to states in that class of cases in which such deference will maximize political support,³⁶⁴ public choice theory offers strong evidence that Congress cannot always be trusted to keep federalism values in mind when allocating decisionmaking responsibility. The expansion of federal criminal law offers a good example of national legislation that often looks like little more than a cheap grab for votes. One suspects, for example, that neither the federal carjacking statute³⁶⁵ nor the Gun Free School Zones Act was founded on a considered judgment that federalism values required a national solution. If the political process does not protect those values, the argument runs, then a significant role for courts is warranted after all.³⁶⁶

The public choice argument for more intrusive judicial review suffers from several serious weaknesses, however, even beyond the question of its constitutional legitimacy.³⁶⁷ First, while public choice theory certainly enriches our understanding of the political process, its portrait of that process is at best incomplete. Critics have argued persuasively that "noneconomic factors such as altruism and ideology play at least some role in

363. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 266 (1990).

364. Macey identifies three sets of circumstances in which Congress will defer to state regulation:

(1) when a particular state has developed a body of regulation that comprises a valuable capital asset and federal regulation would dissipate the value of that asset; (2) when the political-support-maximizing outcome varies markedly from area to area due to the existence of spatial monopolies, variegated local political optima, and variations in voter preferences across regions; and (3) where Congress can avoid potentially damaging political opposition from special-interest groups by putting the responsibility for a particularly controversial issue on state and local governments.

Id. at 268-69.

365. See 18 U.S.C. § 2119 (1994) (making the taking by violence of a motor vehicle involved in interstate commerce a federal crime punishable by up to 15 years in prison).

366. See Althouse, *supra* note 259, at 818.

367. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 36-44 (1991).

political participation and decisionmaking,³⁶⁸ and that consideration of the public interest is not shut out of the political process.³⁶⁹ Second, even on its own terms public choice theory predicts that Congress is more likely to defer to state-level norm-setting in precisely those areas where the value of state regulation is strongest—maximizing citizen preference through normative diversity and regulatory innovation.³⁷⁰ Third, the loci of decisionmaking preferred by advocates of more intrusive judicial review—federal courts and state legislatures—are themselves subject to interest-group pressures similar to those that plague Congress.³⁷¹ Fourth, and perhaps most important, the use of public choice theory to condemn Congress's failure to defer adequately to states depends on a normative judgment about how much deference is adequate.³⁷² In other words, the public choice case for intrusive judicial review is not a process objection to the nature of political decisionmaking but a normative objection to particular political outcomes.

The controversial nature of public choice claims about defects in the political process, together with the complete absence of constitutional guidance as to how to resolve normative conflicts between state diversity and national uniformity,³⁷³ compel the conclusion that such claims do not themselves justify more searching judicial review, even review closely linked to the promotion of federalism values. In addition, vigorous judicial review of federalism issues creates several related risks that bear on the wisdom of such review.

368. *Id.* at 43.

369. *See, e.g.,* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 12-45 (1991); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 887-901 (1987).

370. *See* Macey, *supra* note 363, at 268.

371. *See* Elhauge, *supra* note 367, at 67-87 (demonstrating that the litigation process is subject to forms of interest-group influence that may be as distorting as such influence in the political process). The relative susceptibility of state and federal governments to interest-group capture is a matter of controversy, or at least uncertainty. *Compare* RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 173 (1985) (asserting that lower transaction costs of capturing states makes states more susceptible), *with* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 504 (A. James Casner et al. eds., 3d ed. 1986) (noting that the relative ease of exit for those harmed by capture makes states less susceptible).

372. *See* Elhauge, *supra* note 367, at 48-66.

373. *See* Briffault, *supra* note 290, at 1350.

The greatest harm threatened by federalism-based limits on congressional authority is the prospect of denying the nation the power needed to address problems beyond the institutional competence of the states.³⁷⁴ Admittedly, the Court's recent Commerce Clause and Tenth Amendment cases do not themselves seem to pose such a threat. Congress can avoid the no-commandeering rule easily enough, through either direct regulation or spending power persuasion. The commercial/noncommercial distinction of *Lopez*, if rigorously enforced, may prove a greater obstacle to congressional action, but most of what Congress has unique institutional competence to regulate is likely to be in some sense "commercial." Nevertheless, cases like *Hammer v. Dagenhart*, *Adkins v. Children's Hospital*³⁷⁵ and *Carter Coal* illustrate that a restrictive view of national authority can, on occasion, deny the institution uniquely competent to address a particular problem the power to act. Recent commentary in the area of environmental regulation, for example, has employed both *Lopez* and *Printz* to argue that the national government lacks authority to enact certain kinds of programs.³⁷⁶ Taking such programs out of play in the policy analysis would necessarily threaten effective environmental enforcement.³⁷⁷

374. Cf. Weinberg, *supra* note 237, at 1341 ("There is a danger, of which history affords enough examples, that on some wrong theory of federalism the Supreme Court will deny a needed power to Congress.").

375. 261 U.S. 525 (1923) (holding that District of Columbia law setting minimum wages for women violated substantive due process), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

376. See, e.g., Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573 (1998); David A. Lineham, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998); see also *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (invalidating Army Corp of Engineers' wetlands regulation as beyond scope of Clean Water Act, noting that Congress might lack commerce power to authorize such a regulation).

377. Not surprisingly, both *Lopez* and *Printz* have been used to challenge the constitutionality of a wide range of federal statutes. One example that has garnered significant attention is the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 8, 18 & 42 U.S.C.). On March 5, 1999, the en banc Fourth Circuit held that the Act's creation of a private right of action for persons injured by "a crime of violence motivated by gender," 42 U.S.C. § 13981, exceeded Congress's power under the Commerce Clause and section 5 of the Fourteenth Amendment. *Brzonkala v. Virginia Polytechnic Institute*, No. 96-1814, 1999 WL 111891 (4th Cir. 1999). See generally David M. Fine, Note, *The Violence Against*

The environmental example illustrates a second and related problem—disputes about the extent of national authority can distract from, and skew, important analysis of relative institutional competence. Because the absence of power moots a claim of superior competence, proponents of state-level norm-setting may be tempted to focus on arguing (or litigating) the lack of national authority to address a particular problem, rather than on demonstrating the advantages of leaving the matter to the states. At a time when the policy discussion concerning institutional choice in environmental regulation is reaching a sophisticated and nuanced level, fighting over questions of power is counterproductive.

Meaningful policy debate is also hampered by the frequent treatment of federalism as nothing more than a limit on national power. The Court's twentieth century federalism jurisprudence fits that description, focusing as it has on protecting state interests by declaring federal laws unconstitutional.³⁷⁸ As discussed above, federalism is as much about the empowerment of the national government as it is about the protection of state government. The Court's relentless focus on federalism as promoting state-level decisionmaking ignores the national side of the ledger, and encourages devolution of authority without regard to critical questions of institutional competence. Indeed, the Court's one-way perspective on federalism gives succor to those "strategic federalists" who are interested not in protecting state-level decisionmaking but in preventing government action at any level. Some who advocate aggressive judicial enforcement of federalism, ostensibly to protect state interests, plainly do so in the hope (or belief) that once the national government is out of the picture the states will choose to do nothing. The National Rifle Association's stirring defense of local law enforcement officers in *Printz*³⁷⁹ is just one of countless examples of strategic federalism that have included opposition to national abolition of slavery, resistance to New Deal era federal labor legislation, and challenges to

Women Act of 1994: The Proper Federal Role in Policing Domestic Violence, 84 CORNELL L. REV. 252 (1998) (describing and criticizing the constitutional challenges).

378. See *supra* Part I; Erwin Chemerinsky, *Federalism Not As Limits, but As Empowerment*, 45 U. KAN. L. REV. 1219, 1221-25 (1997).

379. See Brief Amicus Curiae of the National Rifle Association of America in Support of Petitioners at 8-19, *Printz v. United States*, 521 U.S. 898 (1997).

civil rights legislation.³⁸⁰ Given the opportunity, the NRA undoubtedly would don nationalist garb in order to support a federal statute barring state restrictions on gun possession.

Genuine advocates of a judicially enforced federalism, much like the Supreme Court in *New York* and *Lopez*, are searching for some limit on congressional authority because they know the Constitution's framers did not contemplate an omni-competent Congress. They rightly argue that *Garcia's* argument for nonjusticiability is unsupported either by the framers' intent or by the illusory claim that states are fully protected by the structure of the political process. But given the framers' enumerated-powers approach to limiting congressional competence, and the wholly unanticipated revolution in transportation, communication, and the American economy as a whole, the late-twentieth century reality is that outside the Bill of Rights the Constitution no longer limits congressional power in a serious way. As a consequence, the appropriate judicial role may turn out in practice to be not too different from that advanced by *Garcia*. Any effort by the Court to invent new limits usurps congressional authority and, if intended to have any bite, may prove more harmful than the malady at which it is aimed.

IV. CONCLUSION: FEDERALISM'S FUTURE

The contemporary search for a judicially enforceable federalism has been largely a search for ways to limit national authority. This approach mistakes federalism for a theory of limited government, when in fact it is a theory of allocating government responsibility. The critical question is not how do we protect the states from the nation, but how do we allocate particular responsibilities to the level of government best equipped to handle those responsibilities. Given the national government's power to preempt state law, the dominating interest in "a device to ensure that federal policymakers leave suitable decisions to the states"³⁸¹ may be understandable. Nevertheless, recent history suggests that placing much reliance on courts to fashion such a device, let alone one that advances the full range of federalism values, is a serious mistake.

Despite the lack of meaningful judicial contribution, and contrary to occasional cries of alarm about national usurpation,

380. See Chemerinsky, *supra* note 378, at 1240.

381. Kramer, *supra* note 9, at 1511.

the general allocation of responsibility between the national and state governments is roughly consistent with the normative recommendations of federalism theory.³⁸² By and large, the national government today concentrates on what it is best suited to handle—"income redistribution through pensions, welfare, health care, and other programs aimed at the needy, the sick, the disabled, and the disadvantaged."³⁸³ At the same time, the bulk of economic development programs are appropriately in the hands of state and local governments.³⁸⁴

The picture is not entirely rosy, of course. While the national government has been reducing its involvement in developmental programs since the mid-1970s, it arguably should leave more responsibility for matters like job training, transportation and crime control to the states, which, unlike the national government, have the benefit of useful market signals to judge such programs' effectiveness.³⁸⁵ Particularly in the area of criminal law, recent history has demonstrated that the perceived need to court votes can obliterate considerations of the public interest. The real dark cloud, however, is on the other horizon. In August 1996, President Clinton signed new welfare legislation³⁸⁶ that was designed in large part to move primary responsibility for welfare to state governments. The extent to which the legislation accomplishes that objective is a matter of some dispute,³⁸⁷ but the economics of federalism direct that welfare policy be determined at the national level.³⁸⁸ Those neo-federalists riding the bandwagon of devolution³⁸⁹ appar-

382. See PETERSON, *supra* note 299, at 175-95.

383. *Id.* at 186.

384. See *id.* at 195.

385. As Richard Briffault points out, national programs better handled at the state level can pose problems beyond the relative lack of national competence. "By crowding state agendas with federal programs, and pressuring the states to commit their personnel, treasure, and authority to federal concerns, these measures can limit the capacity of the states to pursue their own state-initiated programs." Briffault, *supra* note 290, at 1352 (citation omitted).

386. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

387. Compare, e.g., Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43, 49 (contending that under the statute states "can now do almost anything they want"), with Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115 (1998) (arguing that the law constricts state discretion in critical areas by requiring adherence to conservative national goals).

388. See *supra* notes 302-05 and accompanying text.

389. See generally CONTRACT WITH AMERICA (Ed Gillespie & Bob Schellhas

ently have forgotten federalism's insight that the national government is better equipped than the states to handle redistribution. Or what may be more likely, they promote devolution of redistribution to the states not because states are likely to do better but rather in the hope of dramatically reducing the overall level of redistribution. While an optimist might predict that true commitment of redistribution to the states will prove unworkable and therefore be short-lived, necessitating a return to national control, this is surely a situation that bears watching. Just as surely, however, it is not a situation about which the courts can or should do much of anything.

What, then, is the appropriate role for judicial review in federalism's future? While the framers did envision judicial review of federalism issues, the mechanism of such review was keeping Congress to its enumerated powers, which, as a result of technological changes beyond the framers' imagination, have appropriately expanded to something close to a general police power. Perhaps the framers also assumed that courts would act to prevent Congress from effectively eliminating states as the constitutive units of our federal structure.³⁹⁰ But given that states are, and seem destined to remain, a salient feature of American political life, it is unlikely that courts will have to perform this last-gasp defense function. As to choosing between state- and national-level lawmaking, the framers did not claim to have worked out the political science and economics of federalism, and did not contemplate that later courts would do that work for them. As a consequence, the Constitution grants no license to courts to second-guess congressional resolution of questions of institutional choice. Moreover, as a practical matter courts are simply ill-suited for the enormously complex (and contestable) task of determining the optimal allocation of power in a federal system.

Despite the Court's apparent nostalgia for a dramatically smaller national government, no judicially enforced federalism doctrine is going to undo the last quarter of the nation's history. And while cases like *New York, Lopez*, and *Printz* may on occasion stimulate important debate, such as the examination of federal criminal law that has followed *Lopez*,³⁹¹ they will

eds., 1994).

390. See Briffault, *supra* note 290, at 1350-53.

391. See, e.g., Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL.

never have more than the most marginal relevance to the allocation decisions that matter most. Those who truly believe in the instrumental values of federalism should therefore focus not on persuading courts to undo congressional "mistakes," but rather on promoting wise institutional choice in the political process.

